IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1148

In the matter of the APPLICATION OF CHERYL SPIDER DECOTEAU, natural mother and next friend, and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a WRIT of HABEAS CORPUS,

Petitioner,

v.

THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR RESPONDENT

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THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR RESPONDENT

Respondent adopts, for the purposes of this Brief, the material in the Brief for Petitioner under the headings "Opinions Below" and "Jurisdiction."

STATUTES INVOLVED

The Treaty of February 19, 1867, 15 Stat. 505, the Act of February 8, 1887, 24 Stat. 388 (General Allotment Act or Dawes Act) and the Act of March 3, 1891, 26 Stat. 989.

QUESTION PRESENTED

Whether the Act of March 3, 1891, amending and ratifying an 1889 agreement for the outright cession of all the unallotted land of the Lake Traverse Reservation to the United

States Government for a sum certain, disestablished said reservation and restored said lands to the public domain.

STATEMENT OF THE CASE

Petitioner, an enrolled member of the Sisseton-Wahpeton Sioux Tribe, is the mother of Robert Lee Feather and Herbert John Spider. On March 12, 1971, pursuant to the standard consent forms then in use by the Department of Public Welfare, State of South Dakota, the youngest child, Robert Lee Feather was given up for adoption by his mother. The older child, Herbert John Spider, was placed in a foster home by the district county court after neglect and dependency proceedings were instituted by the Department of Public Welfare, State of South Dakota, on December 17, 1971.

In August of 1972, Petitioner moved to dismiss the above orders on the ground that all incidents giving rise to the proceedings occurred in Indian Country, to wit: Within the boundaries of the Lake Traverse Reservation. The motion was denied. Petitioner then initiated a Writ of Habeas Corpus in the South Dakota Circuit Court, Fifth Judicial Circuit, on August 16, 1972, seeking to release the children from the care and custody ordered by the district county court. A hearing was held on August 31, 1972, and the Writ was denied. Essentially, the circuit court concluded, in line with the prior history of judicial interpretation given the Act of March 3, 1891, that the Lake Traverse Reservation as established in 1867 no longer existed. Notice of appeal to the Supreme Court of South Dakota was served by Petitioner, assigning as error the conclusions of law of the circuit court.

On October 31, 1973, the Supreme Court of South Dakota, adhering to the same precedent, affirmed. Petitioner had argued that all land once within the boundaries of the Lake Traverse Reservation was still within the boundaries of the Lake Traverse Reservation and that the district county court did not, therefore, have jurisdiction over any portion thereof with respect to the issue in the instant case. In its opinion the

court rejected the arguments of Petitioner and found that the 1867 Lake Traverse Reservation had been effectively disestablished and restored to the public domain by the Act of March 3, 1891. The opinion was addressed only to the issue, as raised by Petitioner, that related to the portion of the 1867 reservation subject to the 1891 Act. Acts or omissions resulting in child neglect that may have occurred on the allotted or trust portion of the original Lake Traverse Reservation *not* within the purview of the 1891 Act, were *not* considered by the court below.

SUMMARY OF ARGUMENT

The Lake Traverse Reservation was disestablished by Congress in 1891 by the ratification of an 1889 agreement whereby the members of the Sisseton-Wahpeton Tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to" all the unallotted land of their reservation for a sum certain. This act, on its face and especially in light of the legislative history and surrounding circumstances, clearly restored the lands so ceded to the public domain. Members of Congress, the Commissioner of Indian Affairs and the Secretary of the Interior, at the time repeatedly and specifically attributed this effect to the ratification of the agreement. The purpose of the Brief for Respondent is to provide this Court with documentation that clearly and unequivocally supports the position that the only construction of the Act of March 3, 1891, consonant with the intent of Congress in *1891*, is that the Lake Traverse Reservation was thereby disestablished. A detailed examination of the significant congressional and administrative documents relating specifically to the Sisseton-Wahpeton portion of the 1891 Act establishes this to be the case. An examination of similar documents of another cession agreement ratified in the same Act as the Sisseton-Wahpeton cession agreement not only serves to buttress this conclusion, but also places the entire issue in a proper historical perspective. The Annual Reports of the Commissioner of Indian Af-

fairs and Secretary of the Interior, as well as the cartographic record of Indian Reservations, unequivocally support this construction of the Act of March 3, 1891, and in addition dispell any preconceptions that the legislation therein was an exception to the prevailing policy of the period.

Since Respondent has viewed the issue presented as essentially one of congressional intent as reflected in the documents of the period, the arguments of Petitioner were not analyzed until after the legislative history and surrounding circumstances were set forth in detail. The jurisdictional implications of the effect of the Act of March 3, 1891, are discussed at the conclusion of the Brief, in what Respondent would term their proper chronological position.

The main thrust of the argument of Respondent centers around the fact that the Act of March 3, 1891, was an explicit manifestation from Congress that the Lake Traverse Reservation should cease to exist as such. The Act does not represent disestablishment via the mere process of allotment. The State of South Dakota has never maintained that the issuance of allotments pursuant to the General Allotment Act of 1887, commonly termed the Dawes Act, disestablished any reservation or portion thereof. Nor has it ever attempted to subject any member of any tribe so situated within the boundaries of any reservation to the jurisdiction of its courts in this respect. Rather, the portion of the Act presented herein for construction is a cession agreement, identical in all material respects to cession agreements utilized by Congress to disestablish reservations or portions thereof for decades. In essence, the Act of March 3, 1891, was a vehicle by which Congress ratified a number of these cession agreements that had been recently concluded. The mere fact that the Sisseton-Wahpeton Agreement had been tailored to certain provisions of the Dawes Act did not alter the fundamental nature of the transaction — a transaction which in this case disestablished reservations or portions thereof in several

states, including Montana, North Dakota and Oklahoma. By this very Act, approximately eight million acres of land previously held within the boundaries of Indian reservations were restored to the public domain for the primary purpose of providing homes to actual settlers. Over three thousand individuals eventually moved their families and homes to settle and work the six hundred thousand acres of land previously held within the boundaries of the Lake Traverse Reservation alone.

While this whole process reduced the reservations to one-half of their original area in a matter of a few short years, and Respondent would be the first to admit that some of the documents herein might at times appear not in all respects consonant with the prevalent moral judgments of today, as they relate to the fiduciary duty of the United State Government toward its Indian wards, this question is not in issue. The whole of Respondent's argument has been structured around the issue as presented, a question of congressional intent to be resolved from the documents of the period viewed in a proper historical perspective — the only perspective available to the thousands of citizens who at the time relied on the representations of the Government of the United States and moved their homes and families to settle and work on what was at the time, and has remained since, a part of the public domain. To alter this perspective today, for whatever reason and thereby resurrect the boundaries of a reservation that have been disestablished for over eighty years, to the detriment of the descendents of those individuals, and subject their lives and property to whatever "sovereign power" any tribe might today or fifty years from today lawfully exercise over non-members residing within the boundaries of any reservation, would be a miscarriage of justice in the truest sense of the phrase.

Many of the citizens of the United States have *elected* to live within the boundaries of a reservation. They have

knowingly decided to subject their lives and property to the many special federal and tribal laws therein. This was a choice presumably made with the realization of the consequences thereof. Such is not the case in the situation presented herein.

ARGUMENT

I

THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE ACT OF MARCH 3, 1891, CONCLUSIVELY ESTABLISH THAT CONGRESS INTENDED TO DISESTABLISH THE LAKE TRAVERSE RESERVATION BY RESTORING ALL UNALLOTTED LAND THEREIN TO THE PUBLIC DOMAIN.

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early date to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indians as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. Report of the Commissioner of Indian Affairs, 8 (1891).

A. CONGRESS DID NOT ALTER THE FUNDAMENTAL PRECEPT OF CESSION AGREEMENTS BY SIMPLY TAILORING THE AGREEMENTS TO THE DAWES ACT OF 1887.

In 1867 the members of the Sisseton and Wahpeton bands of Sioux Indians were given a large triangular area of land known as the Lake Traverse Reservation, situated in what is now the northeastern part of South Dakota. In early 1889 certain members of the tribe were approached and indicated they would sell their reservation: "We never thought to keep this reservation for our lifetime. . . . We don't expect to keep reservation. We want to get the benefit of the sale. . . ." *The Minneapolis Tribune, May 22, 1889 at 1 (Appendix I, 19).*

Soon thereafter, a Commission, sent to negotiate the purchase, concluded an agreement whereby the members of the Sisseton-Wahpeton bands of Sioux Indians agreed to:

> . . . cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said band of Indians as aforesaid. . . . Act of March 3, 1891, 26 Stat. 1035, 1036.

In his Annual Report to the Secretary of Interior for 1890, the Commissioner of Indian Affairs stated that the agreement would *"restore to the public domain* . . . about six hundred and sixty thousand acres in South Dakota, in the Lake Traverse (Sisseton) Reservation" upon ratification. Report of the Commissioner of Indian Affairs, XXXVIII (1890) (emphasis added). The Secretary of Interior's Annual Report was identical in this respect. H.R. Exec. Doc., 51st Cong., 2d Sess. XXVII (1890).

On the floor of the Senate, a moment before ratification, Senator Dawes stated clearly and concisely:

> The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the *surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 per acre for some ten or eleven million acres of land. All this land is *opened* by this bill to settlement as a part of the *public domain.* . . . 22 Cong. Rec. 3879 (1891) (emphasis added).

The agreement was ratified on March 3, 1891, and the sum of one million, six hundred ninety nine thousand, eight hundred dollars was placed by the United States Government in the treasury of the United States to the credit of said Sisseton-Wahpeton Band of Sioux Indians "to pay" for the "lands by said agreement ceded, sold, relinquished and conveyed. . . ." Act of March 3, 1891, 26 Stat. 1039.

In his Annual Report to the Secretary of Interior for 1891, the Commissioner of Indian Affairs stated ". . . The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), *restored to the public domain* . . . from the Lake Traverse Reservation, South Dakota, about 660,000 acres, . . ." Report of the Commissioner of Indian Affairs, 44 (1891) (emphasis added). The Secretary of Interior's Annual Report was identical in this respect. H.R. Exec. Doc. No. 66, 52d Cong., 1st Sess. VII (1891).

The reservation was "thrown open" to settlement in 1892. The large orange triangle representing the Lake Traverse Reservation on the 1891 Indian Affairs Map was immediately and unequivocally removed from the same official Map of the Office of Indian Affairs compiled in 1892 under the direction of the Commissioner of Indian Affairs, showing Indian reservations within the limits of the United States. Report of the Commissioner of Indian Affairs, Appendix (1892). The figures in the "area in acres" and "square miles" sections of the "Schedule showing the names of Indian reservations in the United States, agencies, tribes occupying or belonging to the reservation, etc." which were listed in the 1891 Schedule, were also similarly deleted in 1892. Report of the Commissioner of Indian Affairs, 908 (1892).

From this date on, the "former Lake Traverse" terminology begins to appear in the official communications of the Office of Indian Affairs and the Department of the Interior, a designation found in hundreds of other miscellaneous sources as well. In any one year, this or some designation of similar import appears in communications of those concerned with what "was" the Lake Traverse Reservation, a sampling of which reads:

1. "[F]ormer Sisseton and Wahpeton Reservation" — Assistant Commissioner of the General Land Office (1891). Letter, Appendix I, 1.
2. "[U]pon the former Sisseton-Wahpeton Reservation" — Member of the Sisseton-Wahpeton Bands of Sioux Indians (1901). Letter, Appendix I, 2.
3. "[W]ithin the former Lake Traverse Indian Reservation" — Affidavit of United States Special Agent (1902). Letter, Appendix I, 3.
4. "[C]ertain described land in the former Sisseton Reservation" — Commissioner of Indian Affairs (1902). Letter, Appendix I, 6.
5. "[I]n what was formerly the Sisseton Indian Reservation" — Chairman of House Committee on Indian Affairs (1906). Letter, Appendix I, 9.
6. "[I]n former Sisseton and Wahpeton Reservation" — Commissioner of Indian Affairs (1912). Letter, Appendix I, 10.
7. "[I]n former Sisseton and Wahpeton Reservation" — Acting Chief of Land Division, General Land Office (1913). Letter, Appendix I, 11.
8. "[W]ithin the former Lake Traverse Reservation" — Assistant Commissioner of Indian Affairs (1918). Letter, Appendix I, 12.
9. "[I]n the former Sisseton Indian Reservation" — Commissioner of Indian Affairs (1918). Letter, Appendix I, 14.

Respondent cannot and will not argue that this disestablishment and restoration to the public domain of the Lake Traverse Reservation was intended by Congress to be an exception to the prevailing legislation of the period because the documents of the period simply do not support that conclusion. Indeed, if one were to page through almost any Annual Report of the Commissioner of Indian Affairs or of the Secretary of Interior from 1887 until 1915 a contrary preconception would instantly vanish. The gist of the quota-

tion of the Commissioner of Indian Affairs in 1891 set forth, *supra*, could be similarly documented in 1890 under the heading of "REDUCTION OF RESERVATIONS" or in 1892 under the heading of "COMMISSIONS AND NEGOTIATIONS FOR REDUCTION OF RESERVATIONS." Report of the Commissioner of Indian Affairs, XXXVII (1890), Report of the Commissioner of Indian Affairs, 74 (1892), respectively. Part II, *infra*. An examination of the Maps of Indian Reservations published each year therewith graphically illustrates this precise point. Part III, *infra*.

Therefore, as a preface to the detailed examination of the legislative history of the Act of March 3, 1891, the argument of Respondent will be in the form of a brief reconstruction of the position that Congress assumed in relation to Indian land cessions during the period from 1860 until 1900. To what extent the conclusions drawn from this reconstruction are in conflict with the holding of *Seymour v. Superintendent*, 368 U.S. 351 (1962), and *Mattz v. Arnett*, 412 U.S. 481 (1973), and the line of recent cases adhering to the rationale therein, is, of course, for this Court to resolve in whatever manner it deems appropriate.

Before 1887 it was the fundamental precept and purpose of the Indian land cession policy that the ratification of a cession agreement would extinguish the Indians' claim or title to a given described area. If the ceded area, or area to be so extinguished, included only a portion of the reservation, the boundaries would necessarily be diminished so as to encompass the reduced area or reservation remaining, and the members of the tribe would be required to remove thereto. If the whole reservation was to be ceded or extinguished, the boundaries were nevertheless just as necessarily extinguished, with the tribes involved usually being required to remove to another reservation. In both instances the area so ceded would be restored to the public domain and later "opened" to homesteading.

Respondent has been unable to substantiate that Congress intended to alter this fundamental aspect of Indian land cessions by enacting the Dawes Act of 1887. Indeed, an examination of the documents of the period presented herein would seem to compel the opposite conclusion.

Admittedly, the 1887 Act affected several changes with respect to the established cession policy. However, none of these were in any way intended to affect, nor did they affect the necessary diminution the cession or sale would have had on the boundaries of that particular reservation. In fact, by utilizing Section 5 of the Dawes Act and tailoring cession agreements to conform thereto, Congress could and did effectively reduce the size of Indian reservations at a much more rapid pace than had theretofore been possible. As succinctly stated by the Commissioner of Indian Affairs:

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the *restoration of the unneeded surplus to the public domain*, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. Report of the Commissioner of Indian Affairs, 8 (1891) (emphasis added).

For purposes of illustration, assume that a certain cession or sale for the entire north half of a reservation was proposed in 1889, but only a small percentage of the members of the tribe had as of that date received an allotment. If this proposal nevertheless met with the approval of the Commissioner of Indian Affairs, he would write the Secretary of

the Interior and therein cite §5 of the Dawes Act which provides:

> *And provided further*, That at any time after lands have been allotted to all the Indians or any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate* with such Indian tribe for the *purchase and release* by said tribe, in conformity with the treaty or statute under which such reservation is held, *of such portions of its reservation* not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress . . . Act of February 8, 1887, 24 Stat. 389-390 (emphasis added).

Paraphrased for the purpose of our hypothetical example, this section would allow the Secretary to negotiate for the release of "such portions" of the reservation not allotted if the tribe would consent, irrespective of the fact that only a small percentage of allotments had yet been made and these were scattered throughout the entire reservation.

If the Secretary concurred, he would appoint several commissioners and ask that the Commissioner of Indian Affairs submit a "draught of instruction" for his approval. After approval, the instructions would be forwarded to the Commissioner. In most instances the information contained therein was of a very general nature, such as the year the reservation was created and the number of signatures required for the necessary "consent."

The Commission would proceed to the reservation, negotiate the cession and draw up an agreement for the approval of the tribe containing the price per acre and certain other specifics, such as the total amount of money the United States was to pay for the area ceded, which would be held in trust for the benefit of the tribe, again pursuant to §5 of the Dawes Act. The entire agreement would not be effective until ratified by Congress, again pursuant to §5 of the Dawes Act. Then the agreement would be amended in Congress to provide that the land so sold or released by the tribe to the United States was required to be held by the United States for the sole purpose of securing homes to actual settlers if it was adaptable to agricultural purposes, again pursuant to §5 of the Dawes Act.

In our hypothetical, the agreement would of necessity have to describe and separate the north half or area ceded by some boundary marker or other survey from that portion of the reservation unaffected by the cession, the south half. In all agreements of this type this was in fact the case. One part of the reservation had been ceded and would thereby soon be restored to the public domain and be opened to homesteading upon amendment and ratification by Congress and proclamation by the President. The other part would remain intact and be referred to as the diminished reservation, or the remaining reserve, or just the reservation.

As for those individuals whose allotments were now soon to be situated in a newly created public domain, they were usually given the election to remain so situated or to relinquish their allotment and remove to the diminished reservation and/or the reservation and reselect therein. At a later date this whole process was sometimes repeated again on the same reservation and thus the original reservation would be eventually reduced to one-fourth of its original size with the ceded area restored to the public domain and opened to actual homesteaders.

Of course, in our hypothetical there would be no question as to the effect of the agreements, as ratified, on the boun-

daries of the original reservation. With each opening there would, of necessity, be a proper delineation of the area opened from the area remaining or the diminished reservation. In some cases the "public domain" terminology would appear in the text of the Act and in others it would not. In some cases the "diminished reservation" terminology would be repeatedly referred to in the text of the Act and in others it would not.

In any event, boundary questions over agreements of this type from this era have not been difficult for the courts to dispose of precisely because of the fact that only a portion of the reservations were open and there *necessarily exists* enough documentation related to the remaining or diminished reservation to resolve the issue.

However, the precise effect Congress intended acts similar in all respects to the above example to have, when the agreement provided for a cession of *all* of the unallotted land of the reservation, is a much more difficult determination and is *precisely* the situation presented in the instant case.

The difficulty arises in part because of the fact that if Respondent's reconstruction is correct, there would be no new or diminished reservation and therefore no new or diminished reservation boundaries for the agreement or Congress to be concerned with. Nevertheless, after the opening, the allotments would still be situated on the public domain surrounded by settlers in precisely the same fashion as those areas affected by the hypothetical partial opening discussed *supra*, and the reservation would have been just as effectively disestablished.[1] In addition thereto, in the instant case, the difficulty is compounded by the mountain of

1. Congress was also using this same basic cession format to extinguish reservations via cession agreements concluded with different tribes, each claiming some kind of title in the same area whether it was within or without the boundaries of the existing reservation they were residing upon.

Indian-related legislation that was pending before Congress at the time the Sisseton-Wahpeton Agreement was being considered. Consequently, there is very little legislative history even directly concerned with the Act which this Court must construe, and half of what is available is concerned with a "loyal scout claim" which the Sisseton-Wahpetons had insisted be included with a consideration of the cession agreement.

Thus the importance of construing the Act in a proper historical perspective, *however improper that perspective might now appear*, becomes even more a necessity in order to avoid what Respondent believes, in light of *Mattz*, *supra*, and *Seymour*, *supra*, might lead to a misconstruction of the crux of three decades of legislation. To this end, and for this purpose, Respondent will present (1) the detailed series of quotations from the surrounding circumstances and legislative history of the Sisseton-Wahpeton Act, (2) a comparison of the Sisseton-Wahpeton Agreement, in essence a cession agreement tailored to the Dawes Act, with another pure cession agreement, ratified and passed by the same Congress, the same day, in the same Act as the Sisseton-Wahpeton Agreement. All of the foregoing Respondent thinks will clearly establish that Congress did not intend any modification necessary under the Dawes Act to alter the fundamental precepts of the cession era — precepts which necessarily diminished or extinguished all reservations.

B. THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE RATIFICATION OF THE 1889 SISSETON-WAHPETON CESSION AGREEMENT, WHICH WAS TAILORED TO THE DAWES ACT OF 1887, CONCLUSIVELY ESTABLISH THAT CONGRESS INTENDED TO DISESTABLISH THE LAKE TRAVERSE RESERVATION BY RESTORING ALL UNALLOTTED LAND THEREIN TO THE PUBLIC DOMAIN.

The history of the Sisseton-Wahpeton negotiations follows the same general pattern found in the histories of similar agreements. After a period of time the areas bordering reservations would become populous and in need of additional land. Shortly thereafter, citizens of these communities would begin to lobby for the opening of a portion of the nearby reservation by sending communications to the Commissioner of Indian Affairs and their congressional delegation to the effect that the reservation was a barrier to the general welfare of the country, and blocked the extension and construction of much needed railroads. They would argue that the Indians did not need the reservation, that they were already being allotted and that a large area should therefore be restored to the public domain and opened to homesteading. In general, the citizens were eventually successful.

In the case of the Lake Traverse Reservation, a banker from Milbank, South Dakota, set the process in motion by written communication of April 22, 1889, to the Secretary of Interior stating that the Lake Traverse Reservation was a "great detriment" to the area's "interests" and that it blocked the "progress of two or three lines of railroad" that they needed badly. Letter, Appendix I, 15. Additionally, Mr. Diggs informed the Secretary that the "opening of the reservation would give new impetus to immigration which has been attracted by government lands further west." Letter, Appendix I, 15.

On May 1, 1889, Mr. Diggs assembled a convention of eight counties in Watertown, South Dakota, to "take Action Relative to the Opening of the Sisseton Indian Reservation."

2. The construction of a railroad through a reservation involved a great deal of bureaucratic inertia.

3. Mr. Diggs was referring to the recent "opening" of the Great Sioux Reservation in South Dakota, which disestablished and restored to the public domain approximately 11,000,000 acres of land previously within the boundaries of the Great Sioux Reservation.

Resolution, Appendix I, 16. A resolution was prepared to the effect that the delegation would support the Indian "loyal scout claim" since this was necessary to obtain the consent of the Indians to opening the reservations to settlement — a reservation that was stated to be "lying in the midst of a well settled section of country . . . a barrier to the completion of railroads in course of construction or progress, and to the general welfare of the country," and "not now necessary to the interests of the Indians" since they had taken their allotments of lands. Resolution, Appendix I, 16.

The entire resolution was forwarded to the Acting Commissioner of Indian Affairs on May 4, 1889. Mr. Diggs then arranged a council with the leaders of the Sisseton-Wahpeton band, Chief Gabriel Renville and nine of his headmen. Again, members of the tribe expressed the view that if Mr. Diggs and his friends would help them clear up the "loyal scout claim" they would consent to the cession. In their words:

> We never thought to keep this reservation for our lifetime . . .
>
> Now that South Dakota has come in as a state we have some one to go to, to right our wrongs. The Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. We want to get the benefit of the sale. If the government will pay what they owe, we will be pleased with the opening. There will be left over allotments 880,000 acres. If the government pays what they owe, and pay what they agree per acre, we will be pleased with the opening. When the government asks me to do anything, I am always willing to do it. I hope you will try to get the government to do what is right.
>
> If the government will do this, it will benefit both the Indians and the whites [and illustrates by holding up a half a dozen keys in a perpendicular position, separately,], we all stand this way [and then, pressing them against each other,], we will be as one key. When the reservation is open we meet as one body. We be as one . . .

> If we get the money we will open up. Your committee needn't be discouraged, we will open up . . .
> We are anxious to become citizens and vote. We have laid before you all we have to say from our hearts. . . . The Minneapolis Tribune, May 22, 1889 at 1 (Appendix I, 19).

After the council, Mr. Diggs continued to bombard the Commissioner of Indian Affairs with questions of what could be done to facilitate an early opening. Letter, Appendix I, 21. On June 21, 1889, the Commissioner responded by forwarding the above mentioned resolution to the Secretary of the Interior with a cover letter wherein the Commissioner quoted the applicable section of the Dawes Act that made it lawful for the Secretary to negotiate with an Indian tribe:

> [F]or the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribes shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of the Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress . . .

and noted that the 1867 Treaty creating the reservation contained "no provisions applicable to such negotiations." Letter, Appendix I, 23.

He further stated that he thought it would "be for the best interests of the Indians to throw open to settlement a large portion of their surplus lands," and cautioned the Secretary that:

> Such negotiations can proceed no further than securing the consent of the Indians to the sale of such portion of the reservation as may be agreed upon, and determining the considerations for which they are willing to make the cession, these negotiations to be submitted for the approval of Congress, which alone can prescribe the form and manner of executing the necessary release. Letter, Appendix I, 24.

On August 13, 1889, a set of instructions "for the guidance of a Commission . . . to negotiate with the Sisseton and Wahpeton Indians for the sale of their surplus lands" was forwarded by T. J. Morgan, Commissioner of Indian Affairs, to the Secretary of the Interior for his approval. Letter, Appendix I, 25. The purpose, as per instructions, was for "negotiating with the Sisseton and Wahpeton Indians for the relinquishment of such portions of the Lake Traverse Reservation, not allotted, as said Indians may consent to release." Letter, Appendix I, 26.

Noting that the Treaty made "no provisions regarding the cession or relinquishment of the reservation or any portion thereof," the Commissioner stated:

> You will call a full council of the bands and submit the subject for their consideration. If a majority of such council determine to sell any portion of the reservation, you will then agree upon the quantity of land to be sold, and its location. . . .
> The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement. . . . Letter, Appendix I, 27.[4]

By November 12, 1889, three gentlemen were finally chosen to represent the government in the upcoming negotiations: Charles A. Maxwell, Esq., Chief of the Land Division of the Department of the Interior, Hon. E. Whittlesey, Secretary of

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4. At this point the Commissioner did not contemplate a cession of all the surplus lands. *See* Note 21, *infra*.

the Board of Indian Commissioners, and the aforementioned Hon. D. W. Diggs. Letter, Appendix I, 29.

On November 29, 1889, the Commission arrived at the Sisseton Agency on the Lake Traverse Reservation. A Council was convened and the sessions continued over the next two weeks.

Initially General Whittlesey explained the purpose of their visit:

> General Whittlesey: We greet you all as friends. We know that you are our friends and we are your friends. We do not forget the friendship shown by you in 1862. We know how you have worked since you have been on this reservation for yourselves and for your children. Now you have selected your lands and have patents from the Government. You own those lands and they cannot be taken from you. More than that, you now stand in a new position as citizens of the United States and of South Dakota. You are under the same laws that other people have to obey and are protected by the same laws that protect other people. Coming to this position you need something to make this new start in life. You have a *tract of land* which is unoccupied and of no use to you, and you have been reported in Washington as wishing to dispose of some of those lands; they are yours and no one wishes to take them from you. There is this difference between you and other land-owners, you can *sell* only to the Government of the United States. This being the situation the Secretary of the Interior has sent us here to consult with you about your land. In order that you may know that what I have said is true, I will read to you the instructions from the Secretary. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 16

5. Other gentlemen were considered and rejected as evidenced by the series of correspondence from September through November of 1889. Therein the negotiations were variously referred to as encompassing "sale of their surplus land in their reservation . . . sale of a portion of the surplus land of their reservation . . . sale of their surplus lands . . . sale of their unallotted lands . . . negotiations as to their surplus lands . . . sale of the surplus lands in the Lake Traverse Reservation."

> (1890), containing Council Transcripts (hereinafter cited as C.T. at) (emphasis added).

However, as far as Gabriel Renville was concerned there were other issues that continued to be conditions precedent to any discussions of a sale of the reservation:

> Gabriel Renville: They feel that they are not ready to speak of the surplus lands at present. At a meeting at Big Cooley last summer we told our friends Mr. Diggs and General Pease that there were some things in the way of our *selling* the surplus lands. There were three things in the way. The first is that the Government owes us. We have tried to get it, but cannot. The second is that an error was made in the survey of this reservation, and we claim a piece which we ask be counted in with the surplus lands. We have received our patents since the meeting at Big Cooley, which was at that time the third thing. My friend Diggs went with me to Washington to consult the authorities in regard to these matters. I presented my claim to the Secretary. The Secretary told me that that office would do all in its power to have our claim allowed. The feeling among the people is not that they do not intend to *sell* at all, but what we want is that our claim be allowed first. After that, if a commission comes we will sell to them if we can agree on terms. . . . In 1872 a commission came here, to treat for the lands lying between here and Devil's Lake. The commission called it 8,000,000, but it contained when surveyed 17,000,000 acres. We do not claim anything on this, but think that the little mistake in survey ought to be corrected. We simply want the amount of land included in the surplus land when sold. C.T. at 17 (emphasis added).

General Whittlesey responded with a compromise which was eventually agreed upon:

> General Whittlesey: If we should have the back claim and the opening of the reservation all in one agreement one would help the other. Now we should be glad to hear from you about one thing. If

you should be willing to sell this land how much would you ask per acre? I mean if the claim and *sale of land* was on one agreement. C.T. at 18 (emphasis added).

The only other exchanges of any significance that were concerned with the specifics of the question in issue were:

Mr. Diggs: The adjacent counties want this reservation opened, and also we were interested in your welfare. It would not only help you but it would help them. Now you see we were interested in having the reservation opened while you were interested in having your claim paid. Your interests and ours have come together.

The people who wanted the reservation opened appointed a committee, Mr. Crossfield, General Pease, and myself, to go to Washington to attend to both of these matters. Chief Renville, Mr. Crawford, and this committee went to Washington and talked the matter over. The officers understand that you want the reservation opened and have sent these gentlemen here. They know all about your affairs.

Our proposition is this: After setting aside lands for schools, churches, and any who may not have received allotments, to buy the balance. When we have agreed on a price per acre, we recommend that the back annuities be paid first, from 1862 to date; second, that the surplus lands be paid for at a price agreed upon; these are the two points. We have several members of Congress from the Dakotas. These men are all in sympathy with and will work together to get the bill through. I have in my pocket a letter from one of the Senators saying, "I hope you will make a good treaty with those Indians; I will help get it through." . . . The opening of this reservation can carry your claim through, because by passing your bill they please you and get your votes, and by opening the reservation please the whites.

Gabriel Renville: We are friends; first settle our claim and then we will listen and talk with you about our surplus land.

I have spoken for all of the people, and it is their wish that I should say these things. *In the past*

there has been lots of land sold, but we have not benefited by the sales. In 1867 they promised us they would help us, but they have not helped us very much for many years. Let them first settle our claim and then we will talk about our surplus lands. We are now citizens and can talk with you as such, and do not care to talk about shoe pacs, etc., but cash. *We can buy for oursleves what we need if payment is made in cash, and then we do not care to have the agency here after the surplus lands have been sold.* The people have asked me to say this as their wish.

General Whittlesey: We were sent here to ask you *what land you wish to sell* and to make such arrangements and conditions as we agree upon . . . We have written out here all about the sale of the surplus lands and the payment of this money. It is a long paper and would take me a long time to read it. (Here a synopsis of the agreement or proposition was read.)

Michael Renville: We have only said that when the *sale of surplus lands* is considered we would ask that one hundred sixty acres be given to each member of the tribe. You spoke of money due us, some of us think it ought to come to all who belong here, while others think that none but scouts should receive it. We said in council that we would not sell surplus lands until back annuities were paid, but you say that if the lands are now sold the back annuities would be paid at the same time. This pleases us. We want a transcript of the agreement so that we can take it and consider it.

General Whittlesey: About the land matter. We have been told that some of you have been dissatisfied because some of you get only 40 and 80 acres of land so we have put in this agreement an equal division of land so that each will receive 160 acres. That will include the children born since the allotments of land. These were the two conditions made by you in regard to the sale of the surplus land. Third point. After you have received your back annuities, each receives 160 acres of land; *you will sell all that is left . . . Do you wish to sell your*

lands? How much land do you wish to sell and how much will you ask per acre for the lands you wish to sell? *We have heard you wish to sell all after allotments have been made.*

Mr. Diggs: That this reservation was given you in place of all back annuities according to the Third Article of the Treaty. After I have read that article I want to explain how we hope to overcome that. (Here third article of treaty approved February 19, 1867, was read). Now, I tell you what a lawyer would say; he would say that you were not entitled to back annuities because you received this land for it. You would say that it was yours already; then the lawyer would say that if one was void all was void and you have no land. How are we to overcome that? Our Congressmen are your lawyers and we shall put in their mouths this agrument: "These people have been wrongfully kept out of this annuity and it is *but justice to them that you should admit it and that they be permitted to sell it* [i.e., the reservation] for their benefit as in part for injustice done them." Now, for the benefit you will receive in addition to annuities.

This reservation will be quickly settled by whites, bringing the arts of civilization, establishing schools in every township, so that you can send your children to school without sending them miles away, and I have no doubt you will have entire control of all money coming to you, there being no use for Government schools. Another advantage is, that the whites will exchange work with you. This will enable you to cultivate 50 acres where you now cultivate 10.

There are other advantages which I have not mentioned. One is you will have towns and railroads and good markets near you. All this will make your lands more valuable.

Chief Renville: *It took two summers on the Big Sioux Reservation [referring to the negotiations that preceeded the 1889 Act that disestablished approximately one half of the Great Sioux Reservation] and at White Earth Agency. We do not care to do this in a hurry. We first decided not to sell* until after scout bill was paid, but we reconsidered

yesterday and have made up our minds to do something, but you would not hear us — . . . We know these extracts of laws. We know that a change was made in the *taking of land out West*, and also on the 3 per cent interest. If they can change the law in regard to the taking of land they can do so in regard to the 3 per cent. *We have decided to sell all of the surplus after each has received 160 acres.* We know that the money due us on the treaty of 1851 is ours, and it has pleased us to have that in. In regard to the people out West selling for $1.25 per acre, we know that one acre of our land is worth ten of theirs [Great Sioux, supra]. In 1872 a commission came here and took all we had outside of this reservation for 5 cents per acre, and in *1851 the very best of our lands were sold* at less than 1 cent per acre. *This little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell* for $5 an acre. . . . I do not blame you for not doing all we ask. You are only following instructions of superior officers. Mr. Diggs, are we citizens of the United States?

Mr. Diggs answered: The laws of South Dakota regards you as such, but you are regarded as Indians by the Government as long as you are dependent on it.

Mr. Maxwell said: The fact of an Indian becoming a citizen of the United States does not make him other than an Indian. It does not change his blood or race. Citizenship is a political privilege, while the race of the man shows what he is. Michael Renville asks if they can vote?

Answer (by Commision) Yes.

Mr. Diggs said: You cease to be Indians when the reservation is open and you are drawing interest on money as citizens.

General Whittlesey: I will not weary you with a long talk this morning. When we closed yesterday there was one thing that seemed to be in the way; that was the interest on the amount to be paid for the land and how it should be paid.

Gabriel Renville: There has never been money paid to Indians in a lump in payment for lands. The Government always owes for the land and pays the

interest on the amount the same as when one of you borrow money from another.

General Whittlesey: I do not want any mistake to go out. I want you to understand this agreement. It says that the interest is 3 per cent. In this letter we say that it ought to be 5 per cent, and we ask the honorable Secretary to ask Congress to say it will be 5 per cent. We have also promised to do all we can to make it 5 per cent, and I think you will have the help of the Representatives from Dakota. Now I believe that all understand this. We have talked a long time. If we should stay to hear more my hair could not get much whiter, but I would become too old to act. This is just as we explained it yesterday. We give you an opportunity to sign, but if all of you decide not to sign you have that right, but if you sign you put a great deal of work on us.

Gabriel Renville: Why is it that it takes three-fourths at other agencies to rule while with us you say it takes only a majority. Our treaty does not provide for the *sale of this land* at any time.

General Whittlesey: My friend Gabriel know that among white people a majority rules.

Simonds: This paper is presented for signatures and I have said that I will sign. I am playing no game. I am doing what is right. I have already said that I will sign and will do so now. C.T. at 19-20, 21, 22, 24, 25, 26, 27, 28-29 (emphasis added).

It took an additional three days for the Commission to obtain the required majority of adult male signatures and on December 27, 1889, the signed agreement and their report thereon was forwarded to the Commissioner of Indian Affairs. This report is essentially a condensation of events which occurred during the Council containing the same "selling of their reservation" terminology.

On January 28, 1890, the Commissioner of Indian Affairs forwarded the above document and his report to the Secretary of the Interior stating in part that:

It appears from the report and the accompanying papers that an agreement was reached with said Indians, which is in substance as follows, to wit.

By Article I, the Indians cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments and additional allotments provided for in Article IV shall have been made.

Article II provides that the United States will pay to the Indians $2.50 per acre for the land ceded.

Article III provides for the payment of back annuities, and continues the annuities of $18,400 until July 1, 1901.

Article IV provides for the equalization of allotments so that each person, including married women, shall have 160 acres. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 3 (1890).

In all, the Commissioner noted that there would be approximately "662,780 acres to which the Indian title is extinguished by the terms of the agreement calling for an appropriation 'for the ceded lands, . . . 662,780 acres at $2.50 per acre, $1,656,950.00.' " S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 5 (1890).

On February 8, 1890, the Secretary of the Interior, John W. Noble, forwarded all of the above documents and his report to President Benjamin Harrison. Secretary Noble reiterated that:

By the agreement the said Indians cede, sell, relinquish, and convey to the United States all their right, title, and interest in and to the unallotted lands within the Lake Traverse Reservation in North and South Dakota, remaining after certain additional allotments provided for shall have been made, at the uniform price of *two dollars and fifty cents per acre.*

Allotments were made in 1887 upon this reservation to all who applied for and were found entitled thereto, in quantities as provided in the act of Congress approved February 8, 1887 (24 Stats., 388), under the fifth section of which the

> negotiations resulting in the agreement now presented were conducted.
>
> The Indians, however, were dissatisfied with said quantities (160 acres to each head of a family, 80 acres to each single person over eighteen years of age and to each orphan under that age, and 40 acres to each other single person under eighteen years of age), and insisted as a condition of the sale of their surplus lands that there should be allotted to each individual member of the band, without regard to age or condition, a sufficient quantity, in addition to the amount heretofore allotted, to make 160 acres. The fourth article of the Agreement accordingly provides for such additional allotments. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 2 (1890).

President Harrison's report and all of the above documents were then presented to Congress on February 18, 1890. In the President's message it was noted that:

> Perhaps the question of the payment by the United States of the annuities which were forfeited by the Act of February 16, 1863 (12 Stats., 652), should not have been considered in connection with this negotiation for the cession of these lands. But it appears that a refusal to consider this claim would have terminated the negotiation, and if the claim is just this allowance has already been too long delayed. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 1 (1890).

The very next day the Vice President presented the President's message and accompanying papers to the Senate. 21 Cong. Rec. 1470 (1890). Senator Dawes then immediately moved that they be referred to the Committee on Indian Affairs and printed. 21 Cong. Rec. 1470 (1890). The same procedure was followed in the House on February 20, 1890, and, in addition, the entire text of the agreement was published in the *Congressional Record* at the request of Mr. Gifford from South Dakota. 21 Cong. Rec. 1549 (1890).

On February 21, 1890, Mr. Gifford introduced Bill H.R. 7309 to ratify and confirm the agreement which was referred to the Committee on Indian Affairs but never reported back. 21 Cong. Rec. 1638 (1890).

The agreement next surfaces in the Senate on March 21, 1890, with a Mr. Moody introducing Bill S. 3216 to ratify and confirm on behalf of Mr. Pettigrew from South Dakota who prepared the Bill but could not be present to introduce it. 21 Cong. Rec. 2455 (1890). It was then referred to the Committee on Indian Affairs and on April 11, 1890, Mr. Pettigrew submitted S. Rep. 661 to the House. 21 Cong. Rec. 3278 (1890). Only four paragraphs of the six page report were concerned with the cession agreement:[6]

> The Committee on Indian Affairs, to whom was referred Senate bill No. 3216, to ratify and confirm an agreement with the Sisseton and Wahpeton bands of Dakotas or Sioux Indians, and for other purposes, have considered the same, and respectfully submit the following report:
>
> The negotiations of said agreement was made under authority conferred upon the Secretary of the Interior by the fifth section of the act of Congress approved February 8, 1887 (24 Stats., 388).
>
> By the terms of this agreement the said bands of Indians agreed to *cede, sell, relinquish, and convey* to the United States the unallotted lands within the Lake Traverse Reservation on the following conditions, to wit: That certain annuities claimed by them to have been unjustly withheld or forfeited under the act of February 16, 1863 (12 Stats., 652), be restored and paid; that an equalization of allotments be made, so as to give each Indian, without regard to age, sex, or condition, 160 acres; that the purchase price of the residue of their lands be fixed at two dollars and fifty cents per acre, and the proceeds thereof be held in trust by the Government for the sole use and benefit, the same, with the interest thereon, to be at all times subject to appropriation by Congress for their education and civilization. . . .

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6. The remainder of the report dealt with the "loyal scout claims." S. Exec. Doc. No. 66, 51 Cong., 1st Sess. (1890).

As to the equalization of allotments on the basis of 160 acres, provided in the bill, *when viewed in the light of the fact that the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families*, and the further fact that they are soon to assume the responsibilities of citizenship, with all it implies respecting the moral and material welfare of their families, we think that the departure from the general allotment act of 1887 in the case of these Indians is just and proper and should be allowed. This policy is recommended by the Commissioner of Indian Affairs in his last annual report.

This reservation contains 918,780 acres of agricultural lands, 127,887 of which have been allotted to the Sisseton and Wahpeton Indians under the act of Congress approved February 8, 1887 (24 Stats., 388). The additional allotments, as provided in article 4 of the agreement, will require 112,113 acres, making a total of 240,002 acres, which leaves a surplus, *including* the lands occupied by the agency and missionary societies, of 678,778 acres, *the Indian title to which will be extinguished by the terms of the agreement*. The cost of the purchase, at $2.50 per acre, will amount to $1,696,945, which is to be a trust fund held by the United States for the benefit of these Indians. The appropriation named in the bill is estimated to cover the purchase, and pay the back annuities.

Respecting the purchase price of the surplus lands, $2.50 per acre would, at first thought, appear too high; but considering the situation of this tract and the character of the land, in respect to its exceptional fertility and commercial value, the price is not unreasonable. This tract is well timbered and watered, which greatly enhances the value of prairie lands for general agricultural purposes, and besides it is surrounded by populous and prosperous agricultural communities in Minnesota and the two Dakotas, and is also easily accessible by railways. With sundry amendments relating only to the execution of the provisions of the bill, we recommend that the agreement be ratified and confirmed and that the bill as amended do pass. S. Rep. 661, 51st Cong., 1st Sess. 1, 3-4 (1890) (emphasis added).

It was not until May 17, 1890, that the Bill was presented for debate and then there was no debate at all — a four section standard amendment, one of which provided for homestead entry, was inserted and agreed to, and the Bill passed the Senate. 21 Cong. Rec. 4828 (1890).

In the meantime, Bill H.R. 9192 had been introduced in the House by Mr. Hall from the Committee on Indian Affairs on April 9, 1890. 21 Cong. Rec. 3224 (1890). The report thereon contains language similar to S. Rep. No. 661:

> The Committee on Indian Affairs to whom was referred an agreement with the Sisseton and Wahpeton bands of Sioux or Dakota Indians for the purchase and release of surplus lands in the Lake Traverse Reservation, also a bill submitted by the honorable Commissioner of Indian Affairs to ratify and confirm the same, and for other purposes (Senate Ex. Doc. No. 66, fifty-first Cong., 1st Sess.), have carefully considered the same and respectfully submit the following report:
>
> The said agreement was duly executed December 12, 1889, under the authority conferred upon the honorable Secretary of the Interior by the fifth section of the act of Congress approved February 8, 1887 (24 Stats., 388).
>
> By the terms of said agreement the said bands of Indians agreed to *cede, sell, relinquish, and convey* to the United States all unallotted land within the reservation on the following conditions, to wit: That a restitution be made of certain annuities claimed by them to have been wrongfully withheld; that additional allotments be made so as to secure to each member of the bands, without regard to age, sex, or condition, 160 acres; that the purchase price of the surplus lands shall be fixed at $2.50 per acre, and that the proceeds thereof be held in trust by the Government for their sole use and benefit, the same with accrued interest, to be at all times subject to appropriation by Congress for their education and civilization .

Appendix to eight of the nine pages in this report are [illegible] the "Head right claims." S. Rep. 661, 51st Cong., 1st Sess. (1890).

The records of the Indian Office show that the Lake Traverse Reservation contains 918,780 acres of agricultural lands, and that 127,887 of which have been allotted under the act of February 8, 1887 (24 Stats., 388). It will require to make the additional allotments, as provided in article 4 of the agreement, 112,113 acres, leaving a balance or surplus of 678,778 acres, *the Indian title to which will be extinquished by the terms of the agreement*. We are of the opinion that the equalization of allotments on the basis of 160 acres, as provided in the agreement, in view of the fact that these Indians have for many years adopted civilized habits and agricultural pursuits, and are soon to assume the responsibilities of citizenship, with all it implies respecting the maintenance of their family obligations to provide for the future material welfare of their children, and the future fact that the additional allotments are in lieu of any residue which, under their title, they might have retained for the minor children of their respective families, is a just and reasonable provision. The policy of equalizing allotments in quantities of 160 acres is recommended by the honorable Commissioner of Indian Affairs in his annual report, and he heartily approves this article of the agreement. (*See* his letter of January 28, 1890, submitted as a part of our report).

The stipulation in Article II of the agreement, fixing the purchase price at $2.50 per acre, would appear perhaps at first thought, too high, but taking into consideration the character of the tract, being well supplied with water and timber, its exceptional fertility; the average value of the unimproved lands in the vicinity of this reservation, surrounded as it is with the populous and prosperous agricultural communities of the Dakotas and Minnesota, and its accessibility by railways, we think the price is just and equitable and within the purview of the act of February 8, 1887 (23, Stat., 388). . . .

We have further amended the bill providing for the purchase of the sixteenth and thirty-sixth sections by the States wherein it is located, also limiting the settlement of the surplus lands to entries under the homestead laws, and requiring the entrymen to pay $2.50 per acre before patent shall issue, and prescribing the mode of payment. With the amendments indicated in this report, we recommend that the agreement be ratified and confirmed and that the bill for carrying out its provisions do pass. H.R. Rep. 1356, 51st Cong., 1st Sess. 1, 8, 9 (1890) (emphasis added).

This bill was evidently tabled when the Senate passed the version referred to above two days later.

The version that passed the Senate, S. 3216 was referred to the House in May, 1890, and sent to the House Committee on Indian Affairs. 21 Cong. Rec. 4947 (1890). On June 3, 1890, Mr. Gifford, from the House Committee on Indian Affairs, presented the Senate Bill, with an amendment:

> Mr. GIFFORD, from the Committee on Indian Affairs, reported with amendment the bill of the Senate (S. 3216) to ratify and confirm an agreement with the Sisseton and Wahpeton bands of Dakota and Sioux Indians, and for other purposes, accompanied by Report No. 2271 . . . 21 Cong. Rec. 5566 (1890).

It was then placed on the House Calendar but for some reason did not come up for debate until September 29, 1890. On that date it was again Mr. Gifford who presented the Bill:

> Mr. PERKINS. I yield to the gentleman from South Dakota [Mr. Gifford].
> Mr. GIFFORD. Mr. Speaker, I desire to present the following Senate bill which I sent to the Clerk's desk. The Clerk read the title of the bill as follows:
> A Bill (S. 3216) to ratify and confirm an agreement with the Sisseton and Wahpeton band of Dakota or Sioux Indians, and for other purposes.
> Mr. GIFFORD. Mr. Speaker, with the permission of the House, I will make a brief statement with regard to this Bill.
> Mr. KILGORE. Let the bill be read.
> Mr. GIFFORD. It is a long bill, and I will make a brief statement as to its provisions if there is no objection.

The SPEAKER pro tempore. Without unanimous consent is given the bill will have to be read at length.
Mr. GIFFORD. I want to make a brief statement before the bill is read, if I may have unanimous consent to do so. This bill ratifies an agreement made with Indians in South Dakota, something like one thousand Indians, for the *cession or opening* to settlement of a portion of their reservation. The portion opened to settlement amounts to about 700,000 acres of land, 678,000 acres. There are something like 900,000 acres in the total reservation. These Indians have all taken their allotments. They are civilized Indians, not blanket Indians. There remained unallotted for their use and benefit 112,000 acres in round numbers. By the terms of the agreement it is proposed to pay to these Indians the sum of $2.50 per acre. The agreement is perfectly satisfactory to the Indians and to all the parties concerned. The $2.50 per acre will be paid back by the settlers, or, in other words, the Government is reimbursed for the value of the land paid to these Indians for the land. It will be paid back into the Treasury of the United States by the settlers whenever the land is taken and occupied for settlement which will be at once.

In addition to that there is a provision in the bill paying to these Indians something like $450,000 in round numbers for back annuities. These Indians were a part of the Wahpeton band in Minnesota. In 1862 the Government stopped their annuities. About that time a certain number of this band enlisted in the Army of the United States. They served under Sully and Sibley in the Indian Wars of the Northwest and some of them, I think, went south. A provision in this bill proposes to reinstate the annuities of these loyal Indians, but only of the loyal Indians. That, in substance, is a statement of the provisions of the bill. I do not ask to have the bill read at length unless these gentlemen desire it, or unless it will obviate the necessity of going into Committee of the Whole. I do not care to take up the time of the House.
Mr. HOOKER. Does this bill contain an appropriation of money?
Mr. GIFFORD. Yes.
Mr. HOOKER. Then let it go to the Committee of the Whole.
Mr. GIFFORD. Do you insist upon the objection?
Mr. HOOKER. I think so, yes.
Mr. GIFFORD. I would very much desire to have the bill disposed of before Congress adjourns.
Mr. HOOKER. There is no objection to that. This will not prevent its being considered at all.
Mr. GIFFORD. We will have to withdraw the bill, then, if the gentleman insists.
Mr. PERKINS. I yield to the gentleman from Oregon (Mr. HERMANN) for the purpose of calling up a bill . . . 21 Cong. Rec. 10699-10700 (1890) (emphasis added).

From this date forward, the Sisseton-Wahpeton Agreement would never again receive individual attention from the members of Congress. S. 3216 was not placed before either the House or the Senate again and it is not until February of the next year that the agreement emerges from the Washington maze.

Since the introduction of the Indian Appropriation Bill in the latter part of January, 1891, the House had been engaged in a general discussion of the various aspects of the Indian question. Nothing of earth-shaking consequence appears in over fifty pages of the *Congressional Record* that now record the general opinions of the Congressmen on everything from Indian education to Indian wars.

However, on February 16, 1891, Congressman Perkins, a representative from Kansas, proposed an amendment to the Indian Appropriation Bill that would throw both houses of Congress into a general debate for over a month. This amendment incorporated the complete text of five cession agreements, one of which was the Sisseton-Wahpeton Agreement.[8] 22 Cong. Rec. 2762 (1891).

The fact that five agreements were considered *in toto* is, as far as Respondent is concerned, both advantageous and dis-

8. Four of the five, were pure cession agreements. The fifth, the Sisseton-Wahpeton agreement, was a cession agreement tailored to the Dawes Act of 1887.

advantageous: Advantageous in that the information that can be gleaned from the extended remarks by the Congressmen on just about every type or variation of cession agreement that had ever existed provides some remarkable insight into what Congress meant by the cession and opening of a reservation or parts thereof in general; disadvantageous in that the Sisseton-Wahpeton Agreement received very little individual attention and therefore what could have been an excellent source from which to determine congressional intent does not even exist for all practical purposes.

For example, but for the reading of the text of the agreement and the amendments into the Record, all of the extended remarks on the Sisseton-Wahpeton Agreement specifically, could be condensed to less than four pages.[9] The first of these remarks was on February 17, 1891, when a Mr. Holman of Indiana was apprehensive about whether the lands would be opened under the Homestead Law and hence preclude speculation:

> Mr. HOLMAN. I wish to say to my friend from Arkansas [Mr. PEEL] that the main objection to this amendment and especially to the treaties with the Sioux of North and South Dakota, and with the Coeur d'Alene Indians, is this: That the lands are to be disposed of upon a principle entirely different from that contemplated by the homestead law. In view of the fact that the lands we are now acquiring from the Indians with the exception of the western portions of the Indian Territory, are the best lands remaining, and the only ones, practically, which are adapted to settlement without irrigation, it does seem to me that if there ever were any lands to which the homestead feature of the law ought to apply, it should apply to these lands.
>
> I think, notwithstanding the fact the $1.25 an acre has to be paid for some of these lands, namely,

9. Because this portion of the *Congressional Record* is the debate on what would eventually become the Act of March 3, 1891, Respondent has set forth, infra, the entire text of that portion of the debate which was concerned with the Sisseton-Wahpeton agreement.

> those ceded by the Coeur d'Alene Indians, and that $2.50 an acre is to be paid for those ceded by the branch of the Soux Indians in the Dakotas — notwithstanding these payments are to be made, that is no reason whatever why the homestead principle should be abandoned. *I insist upon that as the only way in which you can prevent speculation in your public lands* and I trust my friend from Kansas [MR. PERKINS] will not even desire that the disgraceful scenes witnessed in the settlement of Oklahoma shall again occur in this country; the spectacle of speculators seeking to seize land, and then pressing upon Congress legislation in violation of the principles of the homestead law, by which to acquire their title.
>
> Mr. PERKINS. My friend will allow me to suggest that at the time he speaks of the only provision of law opening these lands to settlement was the homestead law.
>
> Mr. HOLMAN. Well, not strictly; but the hope was manifestly held out that that law would be modified.
>
> Mr. PERKINS. Oh, no.
>
> Mr. HOLMAN. I live in a section of the country from which there was a heavy emigration to Oklahoma. As a general rule persons went there for the purpose of speculation and not for the purpose of obtaining homes.
>
> Mr. GIFFORD. If my friend from Indiana will permit me, I will say that under the agreement ratifying the treaty made with the Sisseton and Wahpeton Indiars the lands are only *open to homestead settlers*, and they are to be paid for at the rate of $2.50 an acre.
>
> Mr. HOLMAN. But the provision is deceptive, as my friend will see.
>
> Mr. PICKLER. Oh, no, it is not.
>
> Mr. GIFFORD. The gentleman will see by referring to section 5.
>
> Mr. PERKINS. If the gentleman wishes to offer an amendment covering the proviso that he states I will not interpose any objection.
>
> Mr. ROGERS. That is right.
>
> Mr. HOLMAN. I want to say to my friend that the proviso he refers to reads as follows: *Provided*, that the settlers upon said lands shall be permitted to purchase the same at the rate of $2.50 per acre, one-

fourth to be paid in cash and the balance in three equal annual installments until paid, and patents shall not issue until the settlers or entrymen shall have paid to the United States the sum of $2.50 per acre. My friend will see that nothing is said about the homestead law.

Mr. GIFFORD. But in Section five of that bill that is provided for.

Mr. HOLMAN. Section Five does not apply here.

Mr. GIFFORD. I do not agree with the gentleman about that. But in any event we are perfectly willing to accept an amendment making the *lands open to homestead settlers only*, because that is what we want.

Mr. HOLMAN. I propose this amendment:

Provided, further, That all the lands *ceded* to the United States by said treaties which shall be subject to entry and settlement shall be disposed of under the provisions of the homestead law in all respects whatever, except as to the payment therefor, as provided by law, and except also as to Section 2301 of the Revised Statutes, which shall not apply to such lands. Those are the two exceptions I wish to make.

Mr. PICKLER. What is the Section of the Revised Statutes which you provide shall not apply?

Mr. HOLMAN. That is the commutation clause. I wish to call my friend's attention to the fact that if the $2.50 sales are made, retaining that section, then at the end of six months, unless the bill is amended, a purchaser may pay the $2.50 an acre, which opens up this whole great body of land to speculation; a thing that ought not be thought of at this time.

Mr. GIFFORD. I, for one, am willing to accept the amendment, because I wish to see the same object accomplished which the gentleman intends.

Mr. PERKINS. I wish my friend from Indiana would send his amendment to the Clerk's desk so that it may be read. I did not quite comprehend it.

Mr. HOLMAN. This will require that the several provisions shall be stricken out which would be in conflict with this.

Mr. PERKINS. Certainly.

Mr. WILSON, of Washington. I want to ascertain the gentleman's views on this matter.

The CHAIRMAN. The amendment of the gentleman from Indiana will be read.

The Clerk read as follows: *Provided further*,

That all the lands *ceded* to the United States by said treaties which shall be subject to entry settlement shall be disposed of under the provisions of the homestead law in all respects whatever, except as to the payment therefor, as provided by law, and except also as to section 2301 of the Revised Statutes, which shall not apply to such lands.

Mr. HOLMAN. Now, Mr. Chairman, I wish to say but one word further. With the understanding that the proposition shall be accepted, and also that all the provisions in conflict with the provision shall be modified, I shall not so far as I am concerned, press the point of order.

Mr. PERKINS. I hope, Mr. Chairman, that that may be done.

Mr. WILSON, of Washington. Does the section of the Revised Statues apply to the commutation?

Mr. HOLMAN. Yes, sir.

Mr. WILSON, of Washington. And you want to eliminate that?

Mr. HOLMAN. Yes, sir. I wish to call the attention of the gentleman to the fact that, as to these two bands in South and North Dakota, *I think the vast body of land in the Dakotas occupied by the Sisseton and Wahpeton bands of Indians would go to the speculators if some such provision were not applied.*

Mr. PEEL. That amendment is acceptable.

The CHAIRMAN. Does the gentleman understand that the point of order is not pressed, and that this amendment is accepted?

Mr. HOLMAN. This amendment is to come in at line thirteen; and also the other proposition, that the other provisions of the bill be made to conform to it.

Mr. PERKINS. Certainly.

The CHAIRMAN. Is the point of order withdrawn?

Mr. HOOKER. I want to say a word upon that.

The CHAIRMAN. The gentleman from Mississippi. . . . 22 Cong. Rec. 2809-2810 (1891) (emphasis added).

The second reference to the Sisseton-Wahpeton Agreement was in the Senate on February 27, 1891. In response to a

statement by Senator Dawes that the agreement incorporated in the amendment had separately passed the Senate previously and those now in the amendment were simply copies thereof, Mr. Pettigrew remarked:

> Mr. PETTIGREW. I think the statement of the Senator from Massachusetts is entirely correct, except as to section 26, on page 203, with regard to the agreement with the Sisseton and Wahpeton Indians of South Dakota. In that instance the Senate passed a different provision with regard to the disposition of the lands of those Indians.
> Mr. DAWES. Mr. President, I am bound to correct myself, not only as suggested by the Senator, but to this extent as to each of them. In them all we have changed in this appropriation the price per acre, and we have provided that it shall be $1.50 per acre as to all of them except the Sisseton, which is to be $2.50 an acre, because that is what we paid to those Indians; and we have provided that it shall be paid by the homesteader in full within five years from the date of his first entry, and that one-half of it shall be paid in two years. Those changes as to the disposition of the lands enter into the seven agreements. I think I have stated it correctly now.
> We have also modified the disposition of the land. Of course, it is beyond our power to modify the agreements. The agreements are *in haec verba* as made by the commissioners, as read in the Senate, and as adopted by the Senate in separate bills.
> Now, Mr. President, I would like to escape the reading of that which it is proposed to strike out, and which is sixty or seventy pages, and the placing in its place of some number of pages, as I have suggested.
> Mr. CALL. Mr. President —
> The PRESIDING OFFICER. Does the Senator from South Dakota [Mr. PETTIGREW] yield to the Senator from Florida [Mr. CALL]?
> Mr. PETTIGREW. No, sir. There is one additional feature, and that is this: The bill, as it passed the Senate, gives the Sisseton and Wahpeton Indians 5 per cent interest upon their permanent fund, and this is the amount of interest which the United States has paid to the Sioux Indians upon the Sioux reservation [Great Sioux, *supra*] and to the Indians in the Indian Territory. It seems to me that these Indians who have been friendly to the government, not only in the past, but always, even during the Minnesota difficulty in 1862, ought not to be deprived of this 2 per cent interest. 22 Cong. Rec. 3453 (1891).

The third reference was also made by Mr. Pettigrew in the Senate and again was initially concerned with the "interest" question:

> Mr. ALLISON. I should like to know why this change is to be made?
> Mr. PETTIGREW. The amendment which I have offered is exactly the same as a bill which passed the Senate with regard to the disposition of these lands, except that it requires the homesteader to pay $1.50 per acre instead of $2.50 per acre and reserves for the benefit of the public schools sections 16 and 36.
> Mr. DAWES. So far as the last suggestion of the Senator is concerned, the Senator from Montana [Mr. SANDERS] has an amendment which applies to all of the agreements, prescribing that the sixteenth and thirty-sixth sections in all cases shall be reserved for schools.
> The reason why it is proposed to have the settler pay $2.50 for this land is because the land was of such value that we were obliged to pay that sum for it to the Sissetons and Wahpetons under the agreement. *We have paid a very large sum for this land, larger in proportion per acre than under any of the other agreements.* Therefore it was deemed wise that we should recover it back from the settler. It was stated by the commissioners before the Committee on Indian Affairs that this land was so valuable that it would be taken at $3 or $4 or $5 an acre, and it was suggested that we fix the price at $2.50 an acre, which they thought ought to be the minimum price for it. We should thereby come somewhere near reimbursing ourselves for the large sum paid for this land to the Sissetons and Wahpetons.
> Mr. EDMUNDS. How much do we pay the Indians?

Mr. DAWES. Two dollars and a half an acre. I hope, therefore, the amount fixed in the bill will not be reduced.

Mr. MORGAN. There is another reason connected with it, and that is that 160 acres is the largest amount that a man can buy of this land. It was supposed by the committee that, being confined to 160 acres at $2.50 an acre, the land being worth it, and worth a good deal more, it would draw into that country a better class of population, which was thought to be a good move.

Mr. EDMUNDS. Then we ought to disagree to the amendment of the Senator from South Dakota.

Mr. PETTIGREW. I wish to say that these are agricultural lands. As to the Coeur d'Alene reservation, under this same bill the settler is required to pay but $1.50 an acre, although we have agreed to pay over $500,000 for less than 200,000 acres, and I can see no reason why there should be any discrimination against the lands on the Sisseton and Wahpeton reservations.

Mr. DAWES, Let me read a little from this agreement:

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of $2.50 per acre for each and every acre thereof.

Then it is agreed that the sum so paid shall be paid as provided in detail in the agreement. *Now, if we pay the Indian $2.50 an acre for this land and open it to settlement, the settler should be required to pay $2.50 an acre.*

Mr. PETTIGREW. I will answer the Senator from Massachusetts. *Under the agreement made heretofore with the Indians we have bought their lands and opened them to settlement under the homestead law at $1.25 per acre.* Under this bill we purchase the Coeur d'Alene reservation and pay $500,000 for 185,000 acres of land which is to be open to settlement at $1.50 per acre, and yet in the agreement with the Sissetons and Wahpetons this bill requires that the settler shall pay $2.50 an acre for lands which are purely agricultural and only suitable for settlement, and which I believe should be opened to settlement under the provisions of the homestead law.

There is no provision in this bill or in the ratification of any of these agreements which requires any settler to pay over a dollar and a half an acre, except in the land to be opened for settlement in the Sisseton and Wahpeton Reservation. I can see no reason why that exception should be drawn as to those lands. It is questionable whether they are as valuable as other lands which are to be opened under these agreements.

Mr. MORGAN. They are generally worth more than $2.50 an acre.

Mr. PETTIGREW. That is exceedingly doubtful, and I question whether they will be settled under the provisions of this proposed law, which requires the payment of $2.50 an acre.

Further than that, my amendment requires that sections 16 and 36 shall be donated for the purpose of supporting the common schools of the State of South Dakota. If that provision were rejected as to every reservation in the State of South Dakota when we were admitted into the Union, we would have lost more than half of all the school lands donated to the State, which would be unjust and unfair, and inasmuch as we received no grant of swamp lands whatever —

Mr. DAWES. If the Senator will allow me, $2.50 an acre is not all we give to these Indians, for in article 3 of the agreement it is provided.

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of $342,778.37, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people when at war with the United States.

So that we have to make an appropriation of $342,778.37 for these Indians in this bill. 22 Cong. Rec. 3457-3458 (1891).

Three days later, with the bill in its final form, the question concerning the price the settlers were to pay the United States government for the land was raised once more:

> Mr. HOLMAN. . . . I would like to have the gentleman state the action taken in regard to the Sisseton lands.

Mr. PERKINS. I will say that the Senate amended the bill so that the lands should be opened to settlement only under the homestead laws of the United States, and the town-site laws, and the settlers are charged $2.50 per acre for the Sisseton and Wahpeton lands.
Mr. HOLMAN. For the whole of it?
Mr. PERKINS. For the whole of them.
Mr. HOLMAN. How is it as to the other lands?
Mr. PERKINS. *All are opened to settlement under the homestead law,* but the settlers are required to pay $1.50 per acre for the Coeur d'Alene lands, *and for the Fort Berthold and the Crow lands $1.50 an acre; and so with all the lands opened to settlement by the provisions of this bill except those acquired by the Sisseton and Wahpeton agreement, for which the settlers are to pay $2.50 per acre.*
Mr. HOLMAN. Now, in regard to the homestead provision. Is there any modification whatever in that?
Mr. PERKINS. None whatever; in fact, the Senate bill and the bill we have agreed upon is not as liberal in that particular as the bill we passed in the House. In the House we gave to those who had exercised the privilege of locating upon the prairies of the West under the homestead law, but who had subsequently lost their lands by contests, dry seasons or misfortunes, the opportunity to take these lands in Oklahoma the same as those who had never settled upon public land under the homestead law; but it was thought by the Senate conferees that this right was extended under the recent act of Congress repealing the pre-emption law, and so we receded from our disagreement.
Mr. HOLMAN. The balance of the homestead law, so far as applicable, except the section repealed, 2301, is covered by the bill.
Mr. PERKINS. The provisions of the homestead law are respected and upheld as to all the lands covered by the bill except as we amend the amendment of the Senate so as to preserve to the late Union soldiers and sailors the special privileges conferred upon them under the homestead law except as they pay the same price as the other settlers —
Mr. HOLMAN. Then except as to the last feature, which is expressed in the homestead law, the other laws are applied.

Mr. PERKINS. Except as before suggested, the lands are to be paid for by the settlers.
Mr. MANSUR. You charge the settlers $2.50 an acre for this land, which is a very poor illustration of the doctrine that you held that you wanted these lands for the poor.
Mr. PERKINS. *We paid the Indians for* them. We paid for the Sisseton and Wahpeton lands $2.50 an acre. It is said they are worth more than that. The commissioners who visited those Indians and conducted the *treaty* believed that they were worth $2.50 an acre, and consented to pay the Indians that price for them. In the Senate, as well as in the House, it was thought right to charge the settlers $2.50 an acre for them, and the bill as it passed the House charged the settlers for the lands the price paid the Indians for them. 22 Cong. Rec. 3784 (1891).[10]

The final reference to the Sisseton-Wahpeton Agreement was made on the day of passage:

Mr. GORMAN. Now, do I understand the Senator from Massachusetts to say that provision is made here for the Government to charge the settler the same amount per acre that Government has paid to the Indian for this land?
Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is about $16,000,000. The Indian appropriation bill proper contains about $7,200,000. *The remainder of the*

10. The only other reference to the Sisseton-Wahpeton Agreement in the *Congressional Record* involved an emergency clause:

Mr. COCKRELL. I would like to ask the Senator in charge of the bill what is the change made in the amendment numbered 39?
Mr. DAWES. The report adds at the end of the amendment the words "to be immediately available." That is all the difference there is.
Mr. COCKRELL. "To be immediately available?"
Mr. DAWES. Yes.
Mr. COCKRELL. Instead of waiting until the end of the fiscal year?
Mr. DAWES. Exactly. Because those Indians were represented at the Department and by Senators here to be in a very distressed condition, it was thought better that the appropriation should be available in the spring rather than to wait until July. That is all. 22 Cong. Rec. 3877 (1891).

bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain. In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as part of the public domain upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 per acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

The Bill passed the Senate a few minutes later and therefore, as the Court can see, very little specific information exists in the *Congressional Record* to aid this Court in the construction of the specific Act under consideration. However, as exemplified by the last remark of Senator Dawes, there does exist information from which Respondent thinks an accurate insight can be gained into the continuation of the whole cession policy in general and its necessary effects on the boundaries of any reservation or portions thereof and in this respect aid the Court to consider the Sisseton-Wahpeton Act in its proper historical perspective. As Senator Dawes stated:

> Mr. DAWES. . . . The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians *for the surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. *All this land is opened by this bill to settlement as part of the public domain* upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians *for the surrender* $2.50 an acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

In this one paragraph, the most influential and knowledgeable man that has ever participated in Indian Affairs in Congress sums up precisely and in clear and unambiguous language the sum total of congressional policy with respect to any cession agreement — and irrespective of whether it was tailored to conform to the Dawes Act of 1887. *The thrust of the whole process was to simply obtain a surrender of a reservation or a portion thereof to the public domain for the purpose of providing additional land to homesteaders, or in a more shorthand descriptive terminology, to "open the reservation" to homesteading.* More important than this singular remark however, is the fact that the essence of what is stated therein is repeatedly and expressly confirmed throughout the 250 other pages of the *Congressional Record* concerned with this Indian appropriation bill. Of course the 1887 Dawes Act was directly and indirectly involved. Most importantly, the individual members of the tribe were thereby assured of some permanent remnant of land via allotment and no "openings" or "cessions" would be had in derogation thereof.

But the crux of the whole process remained the same as the remarks of the other members of Congress indicate:

> Mr. PERKINS. Mr. Speaker, this bill is an important one. All the pending agreements or treaties for the *purchase of Indian lands* are ratified and confirmed by the provisions of this bill. Some of these agreements have been pending for Congressional action for many months. They had been negotiated with care, by men of ability and integrity, and good faith with the Indians, as well as justice to the pioneer settlers, demanded their approval and ratification.
>
> The bill carries the largest appropriation ever carried by an Indian appropriation bill, but *it extinguishes the Indian title to a great domain and opens it to settlement* by the hardy and progressive pioneers who in a short period of time will convert it into the abiding place of patriotic and enlightened homes, adding much to the development and

prosperity of our common country. 22 Cong. Rec. 3784 (1891) (emphasis added).

Mr. GORMAN. . . . Now, Mr. President, I think I have the right to characterize this as the most extraordinary proceeding. After spending the time here from the 1st Monday of December, during the whole Congress, in considering public matters, *we come for the first time to an Indian appropriation bill to deal with seven or eight treaties, to ratify them, to make provision for the disposal of the public lands that we have acquired by those treaties by the million acres,* in the very last hours of the session, when no Senator of the Committee on Appropriations or in this body can possibly know what this bill means, or how much is involved, or what will be the result of the *disposition of the public lands*. . .

The amount of money that the Senator from Massachusetts says is involved in these treaties is over $6,000,000. That is only a small part of it. The questions *how far the public lands have been disposed of* and in what way I have no doubt the Senator has investigated and the members of the Indian Committee have investigated to the very best of their ability in the time they have had to work, far into the night, to try to get the bill into shape.

Mr. MORGAN. . . . We had better proceed to ratify these treaties, these agreements, because the main part of the agreements not only relates to the *disposition of the public lands amongst the settlers,* but the agreements are all drawn up, they are signed by one Indian and another and another until we say that we have a majority of two-thirds or three-fourths — I forget which it is — of all these different tribes. The agreements are all embodied in writing. There is nothing to be done about them.

When we adopt this bill the statute will not change all these agreements. We do not pretend to make any modification or amendment of the agreements themselves. We merely ratify those, and then we take the estate we have acquired in this way, and after providing for the payment of the money, or whatever it is we have agreed to pay these Indians, *we take these landed estates and parcel and divide them out among the people in a fashion that we think is the most conducive to the occupancy of that country* by an honest, laborious, earnest, and faithful set of people. . . .

Mr. CALL. . . . They are intended to afford an outlet for the great mass of our people who are suffering from the economies which have existed during the existence of the Government. They are a great relief to the people, and they should be *opened for settlement* at the earliest possible day. 22 Cong. Rec. 3454-3455 (1891) (emphasis added).

Mr. GORMAN. Mr. President, I stated last night that, for the first time, so far as I know, in the history of legislation we find seven or eight treaties to be ratified tacked on an appropriation bill, which came in at so late an hour of the session that no member of the Committee on Appropriations, so far as I know, other than the Senator from Massachusetts, who is the chairman of the Committee on Indian Affairs and who had considered nearly all these questions in separate bills, can tell the Senate what is contained in the proposition. Of course we know that if these treaties are ratified we must appropriate $6,000,000 and *make provision for the disposition of from three to five or six million acres of the public domain; but it is done in such a way that I can not explain it to the Senator.* 22 Cong. Rec. 3527 (1891) (emphasis added).

In this respect one would expect to find the position of Respondent supported in the text of, and documents relating to, each of the separate cession agreements. After all, Senator Dawes and the other members of Congress had explicitly referred to and considered that the ratification of the agreements would restore so many acres of land to the "public domain."[11] Certainly, in no instance is there any indication from any member of Congress to infer otherwise. Admittedly, each of the agreements were, as Senator Dawes stated, "agreements made with these Indians by which they have agreed to surrender to the United States about ten million acres of land upon *different* terms agreed to with different tribes of Indians." 22 Cong. Rec. 3453 (1891)

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11. See, the specific remarks of the Commissioner of Indian Affairs attributing the same effect to the Sisseton-Wahpeton Agreement, *supra*, at 7, 8.

(emphasis added). And the terms of the agreements did vary as indicated by the comments of Senator Sanders.

> Mr. SANDERS. . . . I regret as much as any one that these agreements have come here in the shape they have. There are no two of them alike, although they were all prepared in the Indian Office in Washington. *Their crudeness would not justify the suspicion that they had been written by lawyers familiar with this subject.* The treaties themselves, as to that which is purchased by the United States, vary, and I desire to describe them briefly.
>
> In some of the agreements all lands within given exterior lines are sold by the Indians to the United States. *This sometimes is all the land they own, but generally is only a part of the reservation.* Second, in other treaties all lands are sold that have not been allotted to Indians in severalty, and as to these lands that are allotted a deduction is made. Third, there is here another class of agreements where all lands are sold except those which have been allotted and those which shall be allotted hereafter, and the time is prescribed in which the allotment shall transpire. 22 Cong. Rec. 3547 (1891) (emphasis added).

But in terms of the issue before this Court, the effect of ratification remained the same — irrespective of the fact that the Sisseton-Wahpeton cession had been tailored to the Dawes Act.

Unfortunately, allocation of time and resources does not permit Respondent to examine and present the documentation and surrounding circumstances of each of the other pure cession agreements which contain material relevant to the determination of the issue herein. However, for purposes of a general discussion and clarification, in addition to substantiating our position with respect to the continuance of the crux of the cession policy as modified by the Dawes Act, in general, the agreement with the Crow Tribe is deserving of some analysis

In the first instance, the 1890 agreement with the Crow Tribe of Indians is of the type wherein only a portion of the unallotted land of the reservation was sold to the United States; in this respect the situation is on nearly "all fours" with the hypothetical partial opening set forth at 11-15, *supra*. Hopefully, it also should serve to establish some sort of historical perspective to aid this Court in considering the more difficult (*See* 13-15, *supra*) but in all respects analagous situation when all of the unallotted land of a reservation is opened at once, as in the instant case.

C. THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE RATIFICATION OF THE CROW CESSION AGREEMENT, WHICH WAS NOT TAILORED TO THE DAWES ACT OF 1887, BUT WAS RATIFIED BY CONGRESS ON THE SAME DAY, IN THE SAME BILL AS THE SISSETON-WAHPETON CESSION AGREEMENT, CONCLUSIVELY ESTABLISH THAT CONGRESS DID NOT ALTER THE FUNDAMENTAL PRECEPT OF CESSION AGREEMENTS.

1. General Background And Similarity.

The history of the Crow negotiations follows the same general pattern as the Sisseton-Wahpeton and others. The areas bordering the western portion of the reservation became populated and certain citizens began to lobby for the opening of a portion thereof. Eventually, Congress responded by enacting authorization providing:

> That the Secretary of the Interior is authorized and directed to appoint a commission consisting of three discreet persons, whose duty it shall be to negotiate with the Crow Indians for a surrender to the United States of all that portion of the reservation in Montana, or so much thereof as they will consent to surrender. . . . and to report to Congress the result of any such negotiation. But no agree-

> ment for any such surrender shall be valid until ratified by Congress. 21 Cong. Rec. 8778 (1890).[12]

As was the case in the Sisseton-Wahpeton negotiations, a portion of the Crow Reservation was allegedly a "barrier to settlement" and a "positive detriment" to the people of the state, as indicated in the House and Senate Reports:

> It will thus be seen that on the north, the west, and the south, this occupied portion of the Crow Reservation is surrounded by thrifty settlements of people devoted to the development of the resources of the contiguous country. This portion of the reservation constitutes a *barrier*, separating the people of the Yellowstone Valley from the settlements south of the reservation, and is, therefore, not only unproductive, but in its *present* condition, *under the jurisdiction of* the General Government *and not subject to settlement in any way*, this west end of the Crow Reservation is a positive detriment to the people of Montana, of no value whatever to the Crow Indian tribe. H.R. Rep. No. 80, 51st Cong., 1st Sess. 2 (1890) (emphasis added).

Pursuant to the authorization, the Secretary of the Interior immediately dispatched a Commission that with all due diligence procured an agreement with the members of the Crow Tribe on December 8, 1890. The transcript of the negotiations, while not as lengthy, contained remarks similar to the Sisseton-Wahpeton transcript:

> Mr. RICHARDSON. . . . The Great Father has sent us here on a mission: that mission is to talk to you about *buying a part of your land*. He desires to purchase a portion of your reservation for which he thinks you have little use; if he did not think so he would not have sent us. . . . Now the Great Father wants to *buy that land* and take the money and give it all to the Indians in various ways. . . . S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 10 (1891) (emphasis added).

12 Earlier negotiations with members of the Crow Tribe were attempted but unsuccessful.

Some of the members of the Crow Tribe opposed the sale and others did not. Both continually referred to the business at hand in the same terminology:

> OLD DOG. . . . If they *sell you the reservation* don't let any cattlemen on it, except Williams . . .
> PLENTY COOS. I want the commission, if I give my consent to *sell the land*, to promise to fix the Indians over on the Clarke's Ford, build them ditches and houses and fences, *those that remain there*. If white men come and settle close to the Indians I want good white men for neighbors. You see these people here, I could hold them a good while but they will do as the Great Father wishes. How many cattle will we get? S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 12-13 (1891) (emphasis added).

The operative language of the agreement itself was simply:

> We, the undersigned, adult male Indians of the Crow tribe now residing on the Crow Indian Reservation, in the State of Montana, do this 8th day of December, A.D. 1890, hereby agree *to dispose of and sell to the Government* of the United States, for certain considerations hereinafter mentioned, all that portion of the Crow Indian Reservation in the State of Montana, lying west and South of the following lines, to wit — S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 16 (1891) (emphasis added).

It did not even contain the term "public domain." Yet, in his Annual Report to the Secretary of the Interior for 1891, the Commissioner of Indian Affairs also stated "the ratification of the agreement by the Act of March 3, 1891 (26 Stat., 989) *restored to the public domain* . . . from the Crow Reservation, Montana, about 1,800,000 acres." Report of the Commissioner of Indian Affairs, 44 (1891) (emphasis added). Admittedly, "Congress was fully aware of the means by which termination could be effected . . ." *Mattz v. Arnett*, 412 U.S. 481, 504 (1973). But it did not alter the original Crow agreement to conform to any standard ". . . which *expressly* provided for the termination of the reservation . . . and did so

in unequivocal terms." *Mattz, supra*, at 504 (emphasis added).

President Benjamin Harrison, as in the Sisseton-Wahpeton case, transmitted the agreement and accompanying documents to the Senate and House of Representatives on January 19, 1891. 22 Cong. Rec. 1550 (1891). The agreement was reported out of the House Committee on Indian Affairs on February 5, 1891, and in this respect was not altered in any way. The report simply referred to a "cession of land" and the "land embraced in this cession":

> The Commissioners estimate the quantity of *land embraced in the cession* at 1,800,000 acres, the price agreed to be paid being $946,000, or about 52½ cents per acre. The Secretary of the Interior, in a letter dated January 17, 1891, transmitting to the treaty, together with the recommendations of the Commissioner of Indian Affairs to the President recommends the confirmation of the treaty. In a letter to the Secretary of the Interior dated January 16, the Commissioner of Indian Affairs in strong terms recommends that the treaty be confirmed, and in his letter sets forth substantial reasons why the good of the Indians and interest of the people of the United States would be served by the prompt ratification of the agreement . . . When *the cession of land* now proposed shall have been made. . . . H.R. Rep. No. 3700, 51st Cong., 2d Sess. 1, 4 (1891) (emphasis added).

On the floor of the House and Senate the agreement was again simply referred to as a "cession" or "sale" of surplus "land":

> Mr. SANDERS. The agreement is that the Crow Indians sell to us *all the lands within the limits described, except such lands as had at the date of the agreement been allotted to Indians*. This amendment provides that when we have *bought the land, paid for it*, and surveyed it, and, by proclamation of the President, *opened it and settled it*, under what is facetiously called by the Senator from Massachusetts [Mr. DAWES] the homestead law, *buying it* for $1 an acre, it shall be further reserved from every white man, from every citizen of the United States, until, within sixty days, Indians who have got their money from the United States can go on it and take up such of it as they choose. 22 Cong. Rec. 3548 (1891) (emphasis added).

With the agreement in its final form, as in the Sisseton-Wahpeton case, Senator Dawes stated:

> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is about $16,000,000. The Indian appropriation bill proper contains about $7,200,000. The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the *surrender of a large portion of their reservations to the public domain*. In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as part of the *public domain* upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 per acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

The agreement was ratified and became section 31-34 of the Act of March 3, 1891 (26 Stat. 989).

Not one section of the Crow Act contains the term "public domain." There is no express or unequivocal terminology inserted by Congress — only the operative terminology of "sell and dispose." Of course no one could ever question what effect the Crow Agreement had on the boundaries of the Crow Reservation for the agreement was concerned *only* with a portion of the reservation — analagous in all respects with the hypothetical partial opening discussed at 13-15, *supra*.

Since a portion of the reservation was to remain intact it *necessarily* had to be delineated from the ceded portion. Thus the agreement on its face provided:

> SEC. 33. That the sum of seven thousand five hundred dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, *for the survey of the boundary line between the Crow Reservation and the lands ceded by said agreement*, . . . Crow Act of March 3, 1891 §33, 26 Stat. 1042 (1891) (emphasis added).

Similarly, the legislative history of the Crow agreement is replete with references such as the stateme.' of the Commissioner of Indian Affairs contained in H.R. Rep. No. 3700 ". . . I have provided, both in the bill and in the item, for the cost of the survey of the *boundary line separating the ceded lands from the diminished reservation*. . . ." H.R. Rep. No. 3700, 51st Cong., 2d Sess. 4 (1891) (emphasis added).

In essence, the evidence of the congressional determination to terminate or disestablish in this case had to be, of *sheer necessity*, both ". . . on the face of the act . . ." and ". . . clear from the surrounding circumstances and legislative history. . . ." *Mattz, supra*, at 505.

Assume for a moment, however, that all of the unallotted lands of the Crow Reservation were the subject of this agreement. Logically, one would have an agreement to sell and dispose of all the unallotted lands within the Crow Reservation — *without the previously necessary* discussion of new boundaries and remaining diminished reservation ". . . on the face of the act . . ." or in the ". . . surrounding circumstances and legislative history . . ." *Mattz, supra. There would no longer be a remaining or diminished reservation or reservation*

13. After reservations were surveyed and subdivided into counties, such metes and bounds descriptions and general surveys of the boundaries of reservations were no longer necessary. If the unallotted land in a particular outlying county was ceded, the agreement could rely upon the description of the county.

boundaries and hence no reason to discuss them. All that would remain would be allotments situated on the newly created public domain — in effect, the same precise situation presented in the Sisseton-Wahpeton materials.

The argument of Respondent is soundly supported in this respect by the treatment actually accorded those members of the Crow Tribe already allotted or desirous of taking allotments in the ceded portion of the Crow Reservation. On the first day of the council, Commissioner Richardson explicitly told the members of the Crow Tribe that the "Great Father":

> . . . has told us to give you $830,000 for this part of the reservation, and Indians who stay on ceded lands, if they wish to remain, will have all the rights and privileges of the tribe. . . . He proposes also to take a lot of money and pay the Indians that are on the land we want to buy for their improvements, so that if they come over on this part of the reservation and take up irrigated land they will be better off here than there *but any Indian that wants to stay there can do so. . . . S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 10 (1891) (emphasis added)*; . . .

The members of the tribe understood the ramifications of having their allotments so situated:

> PLENTY COOS. I want the commission, if I give my consent to sell the land, to promise to fix the Indians over on the Clarke's Ford, build them ditches and houses and fences, *those that remain there*. If white men come and settle close to the Indians I want good white men for neighbors. You see these people here, I could hold them a good while but they will do as the Great Father wishes. S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 13 (1891) (emphasis added).

In their report to the Secretary of the Interior, the members of the Commission reiterated that:

> Many of the Crows have had land allotted to them in severalty. During the past year the allotment agent in charge of this work on the reservation located *one hundred and thirty six allotments* on Clarke's Fork River. The Indians on these allotments strongly opposed the sale because it would leave them *outside of the retained portion of the reserve*. When the system of irrigation provided for in the agreement is in operation, large tracts in the valleys of the Little Horn and Big Horn Rivers will be made available for allotment, and as an inducement for the *Indians who live on the ceded portion to move upon the part retained* the agreement provides, in Section 11, that they shall have the right to surrender their allotments and select a new one upon the same terms at any time within three years. S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 8, 9 (1891) (emphasis added).

And Section 11 of the agreement reflected this concern:

> That all lands upon that portion of the reservation to be herein ceded, which prior to the date of this agreement have been allotted in severalty to Indians of the Crow tribe, shall be retained and enjoyed by them: *Provided, however*, That such Indians shall have the right at any time within three years to surrender his or her allotment and select a new allotment *within the retained reservation*, upon the same terms and conditions as were prescribed in selecting the first allotment. *It is further provided*, That every Indian who shall surrender an allotment within the time specified that has improvements upon it shall have like improvements made for him upon the new allotment, and for this purpose the sum of $5,000, or so much of it as may be necessary, is hereby appropriated and set apart. S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 17 (1891) (emphasis added).

On the floor of the Senate a specific amendment even extending this provision for 60 days was proposed by Senator Pettigrew and incorporated into the final act:

> Mr. PETTIGREW. . . . Further than that, as I am informed, under the existing laws these Indians can take selection in severalty upon the land ceded in this treaty; in my amendment, as I said before, simply extends that time for 60 days *after* this bill becomes a law. 22 Cong. Rec. 3549 (1891) (emphasis added).

Respondent would submit that Congress was not concerned with the fact that the members of the whole of the Sisseton-Wahpeton tribe would soon be situated on allotments in the midst of the public domain any more than it was concerned with the fact that some of the members of the Crow tribe would soon be so situated. The salient effect, if not the purpose, of both agreements was the same — *the acquisition of surplus Indian lands to be restored to the public domain for the purpose of providing homes to actual settlers.* This was the case in the pure cession agreement of the Crow tribe and it was still the case in the cession agreement of the Sisseton-Wahpeton tribe — irrespective of the fact that it had been tailored to the Dawes Act. If the allotment provision of the 1887 Dawes Act in the Sisseton-Wahpeton Agreement seems inconsistent with the restoration of the remainder of the Lake Traverse Reservation to the public domain, this inconsistency certainly cannot be substantiated by a comparison with the allotments left on the public domain in the Crow situation.

2. Additional Comparison And Support.

There is further support for the position of Respondent that the Sisseton-Wahpeton agreement was intended to have the same effect on the status of the Lake Traverse Reservation as the Crow agreement undeniably had on that portion of the Crow Reservation.

(a) Homestead Amendment.

The Sisseton-Wahpeton Agreement was amended by Congress so that the lands thereby acquired by the United States would be subject only "to entry and settlement under

the homestead and townsite laws of the United States . . ." Crow Act of March 3, 1891 § 30, 26 Stat. 1039 (1891). The Crow agreement was similarly amended to provide that whenever by operation of law or the Proclamation of the President the lands were to be "opened to settlement" that they be disposed of ". . . to actual settlers only, under the provisions of the homestead laws. . . ." Crow Act of March 3, 1891 § 34, 26 Stat. 1043 (1891).

There is no more reason to assume that Congress intended for the settlers in South Dakota to be settling "within the boundaries" of a reservation than there is reason to assume it could have intended that the settlers in Montana be so situated. For this situation to exist would seem even more incredulous when one considers that these were the *same* Senators and Congressmen, considering, commenting on, and similarly amending both agreements at the *same* time, incorporating both agreements into the *same* bill, and passing that bill the *same* day — *without ever mentioning* on the floor or in the reports that the settlers in one state would be then on the public domain outside the boundaries of a reservation, while the settlers in the other state would still be situated inside the boundaries of the reservation on something less than the public domain, to say the least. This is especially so, in light of the statements in the *Congressional Record* and other documents that, in this respect, all the agreements were to have the same effect.

(b) Terminology.

In both instances, the United States Government, through a duly authorized commission, negotiated and obtained a cession of land to the United States Government from the members of the respective tribes. Although the operative language of the Crow Act contained only the "sell and dispose" terminology, while the Sisseton-Wahpeton Agreement contained the stronger "cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in and to" terminology, numerous references in both Acts refer to the basic transaction as one and the same:

> . . . in consideration of the *cession* . . . portions of the reservation to be herein *ceded* . . . this *cession* of lands . . . said *ceded* portion . . . *cession* of lands . . . lands *ceded* . . . territory by said agreement *ceded* . . . *within the limits of the ceded* portion . . . Crow Act of March 3, 1891 § § 31, 33, 34, 26 Stat. 1039-1042, 1043 (1891) (emphasis added).
>
> . . .lands *ceded* . . . agreement *ceded* . . . the *cession*, sale, relinquishment . . . lands by said agreement *ceded* . . . lands by said agreement *ceded* . . . lands by said agreement *ceded* . . . Sisseton-Wahpeton Act of March 3, 1891 § § 26, 27, 28, 30, 26 Stat. 1035-1039 (1891) (emphasis added).

Similarly, the Crow Act also contained the same "open to settlement" terminology, Crow Act of March 3, 1891 § § 33, 34, 35, 26 Stat. 1042 (1891), and both Acts also variously referred to the transaction as a "sale" or a "disposal."

More importantly, both of the cessions were to the United States Government in return for a *sum certain*. The only difference was that pursuant to the Crow Act most of the money was to be spent on projects with the remainder distributed per capita, while pursuant to the Sisseton-Wahpeton agreement, because of the Dawes Act, the money was to be deposited in the Treasury to the credit of the tribe. Certainly Congress did not think this a significant distinction.

The fact that the Sisseton-Wahpeton Act was a cession agreement between the United States Government and the members of the Sisseton-Wahpeton Tribe for a sum certain was evidently overlooked and misconstrued in the opinion of the Eighth Circuit Court of Appeals in *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (CA 8 1973).

(c) Congress and the Office of Indian Affairs.

The fact the members of Congress and individuals in the various agencies of the United States Government all at-

tributed a similar "effect" to both the Sisseton-Wahpeton and Crow agreements would seem to Respondent to also strongly support the position that both agreements were intended to similarly disestablish and restore to the public domain those portions of the reservations respectively affected. Although certain aspects of this phase of the Sisseton-Wahpeton-Crow comparison have been discussed elsewhere, they will of necessity have to be discussed briefly at this point.

Primarily, Respondent is referring to the fact that from the moment the agreements were tacked onto the Indian Appropriation Bill until they received final passage, each and every member of Congress consistently attributed the same basic and fundamental effect to both the Sisseton-Wahpeton and Crow agreements. *See* the extended discussion set forth at 47-50, *supra*. Of course, the most succinct passage in the entire *Congressional Record* confirming this position was that of Senator Dawes, already referred to several times:

> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is almost $16,000,000. The Indian appropriation bill proper contains about $7,200,000. *The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. *All this land is opened by this bill to settlement as part of the public domain* upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 per acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

Respondent has also previously alluded to the fact that this last gentleman was perhaps the most singularly influential

and knowledgeable Senator ever to participate in Indian Affairs. Indeed, he authored the very legislation that provided for the Sisseton-Wahpeton negotiations and set the format for the provisions of the agreement — the Dawes Act of 1887. As a matter of fact, the whole Senate relied on him to compile and put all of these same agreements in a form acceptable to the Senate. As the *Congressional Record* indicates, Senator Dawes was intensely familiar with not only the Sisseton-Wahpeton and Crow Agreements, but also each of the other agreements:

> Mr. GORMAN. . . . I have no doubt the Senator has investigated and the members of the Indian Committee have investigated to the very best of their ability in the time they have had to work, far into the night, to try to get the bill into shape. . . . 22 Cong. Rec. 3454 (1891).
>
> Mr. CALL. . . . I believe the provisions which the Senator from Massachusetts [Mr. DAWES], to whom the bill was referred, has placed upon it are wise and are as good probably as could result from a more prolonged consideration of the bill and discussion of it in the Senate. . . . I wish to say, Mr. President, that so far as the subcommittee was concerned, and so far as the Senator from Massachusetts [Mr. DAWES] is concerned, who did the principal labor in the examination of these provisions of the bill, of these agreements, and of all the portions of the bill which are provided for carrying them into effect, they gave to the consideration of these provisions all the time that was possible to have been given to them since the bill was reported to the Senate and referred to them. . . . 22 Cong. Rec. 3455, 3456 (1891).
>
> Mr. GORMAN. . . . No member of the Committee on Appropriations, so far as I know, other than the Senator from Massachusetts, who is the chairman of the Committee on Indian Affairs and who had considered nearly all of these questions in separate bills, can tell the Senate what is contained in the proposition. Of course we know that if these treaties are ratified we must appropriate $6,000,000 and make provision for the disposition of from three to five or six million acres of the public domain; but it

> is done in such a way that I cannot explain it to the Senator . . . |B|ut for the familiarity of the distinguished Senator from Massachusetts with this subject, you would have had a bill to consider that would simply have been an outrage, one which would have meant nothing, and it was only after nights of labor by him as a subcommittee that it was placed in the shape in which it now is. . . . I have watched him during the day and night as he has tried to perfect this measure. Great credit is due him, and I for one absolve him from any criticism hereafter. . . . 22 Cong. Rec. 3527, 3880 (1891).

As this Court has stated, ". . . it is the sponsors that we look to when the meaning of the statutory words is in doubt . . ." *N.L.R.B. v. Fruit and Vegetable Packers*, 377 U.S. 58, 66 (1964). In this respect, Senator Dawes' role emerges as not only the sponsor of the Dawes Act of 1887, but also the sponsor, for all intents and purposes, of the agreements in their final form in the Act of March 3, 1891. Respondent would submit that to assume a Senator in this position erroneously construed this fundamental aspect of the agreements would effectively negate the portion of the *Mattz* decision which established that a congressional determination to disestablish or terminate could be made clear from the ". . . surrounding circumstances and legislative history. . . ." *Mattz*, *supra*, at 505. This is especially so in light of the fact that the other members of Congress not only concurred in his analysis but also expressed similar views. Congress had spoken, and although the measure was a "procedural monster," Mr. Call put the issue in proper perspective immediately before passage:

> Mr. CALL. . . . Whatever just complaint there might be for bringing into the Senate at so late a period a bill with so many items upon it and with these agreements, *there is nothing in this bill that is not in accordance with existing law.* These agreements have all been ratified and acted upon by both branches of Congress, Senate and House of Representatives, with the exception of two, and

> those have undergone the most deliberate and searching examination and argument in the Senate, and by decided majorities have been put upon the bill. So the criticism is in these respects unfounded.
>
> All the provisions in this bill relating to the *settlement of the public lands are but the application of the existing law in regard to such settlement* . . .
>
> The appropriations made in the bill for the *release* of the Indian claim of right to this land is in accordance with the *established policy of the Government* and has been demanded by a large majority of both Houses of Congress. The amount is reimbursed, so that it is but a nominal appropriation. The entire amount comes back into the Treasury. It is nothing but a loan of the public credit of the United States to the accomplishment of these purposes and in no respect touches the taxation upon the people of this country. Mr. President, there has been a great deal of objection found to this bill which has no just foundation. *All the legislation to the bill is but the application of the existing law upon the subject.*
>
> That is the condition of this bill. That it came here too late for it to have had prolonged examination in reference to all these items, and that every Senator could not fully comprehend them, is true; and that is all the criticism that can be made upon it. . . . 22 Cong. Rec. 3880-3881 (1891) (emphasis added).

Finally, Respondent has been unable to find anything in the entire legislative history of the Indian Appropriation Bill that can fairly be said to support an opposite conclusion. Even the miscellaneous documents introduced in the *Congressional Record* for debate on other issues raised by the Indian Appropriation Bill attribute this same fundamental effect to the actions of Congress in this respect. For example, on February 14, 1891, Congressman McCord, during a debate on Indian education, quoted from what he termed "a pamphlet on Indian Education, by General Thomas J. Morgan, the present able, intelligent, and efficient Com-

missioner of Indian Affairs." 22 Cong. Rec. 2699 (1891). One of the paragraphs therein stated:

> The second great economical fact is that the lands known as Indian reservations now set apart by the Government for Indian occupancy aggregate nearly 190,000 square miles. This land for the most part is uncultivated and unproductive. When the Indians shall have been properly educated, they will utilize a sufficient quantity of these lands for their own support and will *release the remainder, that it may be restored to the public domain* to become the foundation for innumerable happy homes; and thus will be added to the national wealth immense tracts of farming and grazing land and vast mineral resources, which will repay the nation more than one hundred fold for the amount which it is proposed shall be expended in Indian education. 22 Cong. Rec. 2700-2701 (1891) (emphasis added).

This was the "established policy" of the Government.

Respondent would submit that one could not expect a more unequivocal and probative illustration of the precise effect that the ratification of the agreements had on the Crow and Lake Traverse Reservations than the following excerpt from the 1891 Commissioner of Indian Affairs Annual Report to the Secretary of the Interior:

> REDUCTION OF RESERVATIONS
>
> The work of *reducing the area* of the reservations, by extinguishing by purchase from the Indians their title to the land and its *restoration to the public domain*, has been carried forward rapidly, as is shown in the following detailed statements: . . . The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), *restored to the public domain . . . from the Lake Traverse Reservation, South Dakota, about 660,000 acres, and from the Crow Reservation, Montana, about 1,800,000 acres;* a total of about 8,164,765 acres. . . .
>
> The ceded portion of the Fort Berthhold Reservation, North Dakota, consisting of about 1,600,000 acres, has been thrown open to settlement by proclamation of the President.
>
> The ceded lands of the Coeur d'Alene Reservation, Idaho, were open to settlement from the date of the approval of the act.
>
> Allotments of land are being made on the Lake Traverse Reservation, South Dakota, and the Cheyenne and Arapaho Reservation, Oklahoma, and surveys are in progress on the Crow Reservation, Montana, and when they are completed and the terms of the Act ratifying the respective agreements with the Indians of the several reservations shall have been fully complied with, the unallotted or vacant land embraced within *the ceded portions will be thrown open to settlement*. Report of the Commissioner of Indian Affairs, 44, 45 (1891) (emphasis added).

Again, instead of treating the Sisseton-Wahpeton Act as an exception to the generally prevalent policy of the period, the Commissioner of Indian Affairs makes no distinction whatsoever between the Sisseton-Wahpeton Agreement which was tailored to the Dawes Act, and the Crow cession, which was not.

The Lake Traverse Reservation was equally subject to the general prefatory remarks of reducing the area of the reservations and restoring them to the public domain as was the Crow. Both were specifically stated to have restored so many thousands of acres to the *public domain* and both were soon to be "thrown open to settlement." Report of the Commissioner of Indian Affairs, 44 (1891) (emphasis added).

In fact, Respondent has been unable to substantiate that the Commissioner of Indian Affairs even considered that homesteaders on the six hundred and sixty thousand acres of land in South Dakota would be in a class separate and distinct from the homesteaders on the one million eight hundred thousand acres of land in Montana. Certainly such a conclusion could not be supported by the Commissioner's very general remarks on the very next page of his Annual Report:

RESERVATIONS SHOULD NOT BE REDUCED TOO RAPIDLY

> While perhaps it is possible to push such work too rapidly, I do not hesitate to say that *the ultimate destruction of the entire system of reservations* is inevitable. There is no place for it in our present condition of life, and it must go. *The millions of acres of Indian lands now lying absolutely unused are needed as homes for our rapidly increasing population and must be so utilized. Whatever right and title the Indians have in them is subject to and must yield to the demands of civilization.* Report of the Commissioner of Indian Affairs, 46 (1891) (emphasis added).

Nor would the fact that, after the openings, both the portion of the Crow Reservation and the whole of the Lake Traverse Reservation were similarly removed from the Office of Indian Affairs' published Map and Schedule showing the Reservations and Reservation areas in the United States, respectively, lend any credence to such a distinction. Only in light of the above information can one really appreciate the significance of the following exchange:

> Mr. HAWLEY. I should like to ask the Senator for information, what is the opinion of the Secretary of the Interior and the Commissioner of Indian Affairs upon this bill, whether it is satisfactory to them.
> Mr. GORMAN. The Senator from Massachusetts can answer that question.
> Mr. DAWES. I never knew an appropriation bill satisfactory to a Department, but I think this bill is as nearly satisfactory to the Interior Department as the lot of humanity will permit.
> Mr. HAWLEY. I do not ask whether it is satisfactory as to amounts, but whether they believe in the purposes and principles and measures of the bill.
> Mr. DAWES. *The Interior Department is strongly in favor of the bill in its present shape.* 22 Cong. Rec. 3880 (1891) (emphasis added).

D. THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE OTHER CESSION AGREEMENTS, RATIFIED BY CONGRESS ON THE SAME DAY, IN THE SAME BILL AS THE SISSETON-WAHPETON CESSION AGREEMENT, PUT THE ISSUE IN A PROPER HISTORICAL PERSPECTIVE.

As Respondent stated in the preface to the Sisseton-Wahpeton-Crow section, an allocation of time and resources did not permit any extended discussion or research into the history of each of the separate agreements ratified by the Act of March 3, 1891. Therefore, the Crow agreement was selected for the purpose of a more detailed comparison and discussion to support the position of Respondent by putting the issue to be decided herein in its proper historical perspective. This selection should not be construed to indicate that an examination of the legislative history and surrounding circumstances of the other agreements would have distorted this perspective in any way.

On the contrary, the Fort Berthold agreement, for example, is on "all fours" with respect to the partial effect of the Crow agreement disucssed *supra*, in addition to containing the identical operative "cede, sell, and relinquish to the United States all their right, title, and interest in and to" language of the Sisseton-Wahpeton agreement! Fort Berthold Act of March 3, 1891 § 23, 26 Stat. 1032 (1891). This is especially interesting in light of the preface to the Fort Berthold agreement:

> Witnesseth that whereas it is the *policy of the Government to reduce to proper size existing reservations* when entirely out of proportion to the number of Indians existing thereon, with the consent of the Indians, and upon just and fair terms; and whereas the Indians of the several tribes, parties hereto, have vastly more *land* in their present reservation than they need or will ever make use of, and are desirous of disposing of a portion thereof in order to obtain the means necessary to enable them to become wholly self-supporting by the cultivation of the soil and other pursuits of husbandry . . .

Fort Berthold Act of March 3, 1891 §23, 26 Stat. 1032 (1891) (emphasis added).

There is certainly no doubt that the 1891 Fort Berthold Act effectively disestablished approximately one half of the Fort Berthold Reservation. As recently as 1972, the Eighth Circuit Court of Appeals confirmed this in *City of New Town v. United States*, 454 F.2d 121 (CA 8 1972), in which neither the court nor the parties even questioned the status of the 1891 boundary.

Furthermore, even a cursory examination of the Fort Berthold legislative history throws considerable light on some of the reasons for not extending the Dawes Act of 1887 to each and every reservation. For example, when the Commissioner of Indian Affairs wrote the Secretary of Interior requesting that the residents of the Fort Berthold Reservation should not be made to await the "slower process" of the general allotment act he stated:

> Agent Gifford states that the Indians are looking for the ratification of the agreement with great anxiety and no little impatience, and that he finds it difficult to satisfy them with any explanation as to the cause of the delay. He says they are ready to take their lands in severalty as provided in the agreement, and that it would be an act of great injustice to them to compel them to await the slower process of the general allotment act to obtain the much-needed means to establish themselves in individual homes through the sale of their surplus lands. . . .
>
> In keeping with the policy of the Government, it provides for the allotment of lands in severalty to the Indians in quantity, and with a similar restriction regarding alienation, as is provided in the severalty act, except that it does not authorize the President to extend the non-alienation period beyond the twenty-five years specified.
>
> In all human probability it would be several years (two or three at least) before the Indians would derive any financial aid from the sale of their surplus lands if the general allotment act were applied in their case, but under the terms of the late agreement the money consideration would be forthcoming at once, and could be expended in assisting them in beginning life on their individual allotments. . . .
>
> Furthermore, by the terms of this agreement a tract of land estimated to contain one million six hundred thousand acres is made available to white settlement. This also is an important consideration.
>
> . . .
>
> As there is no provision in the agreement for subdividing the diminished reservation for allotment, the cost of the surveys will have to be borne by the Government; but this is a very small matter, considering the mutual benefits to be derived from the vast cession of lands made to the Government. The item to be inserted in the bill makes provision for the required surveys. Letter from Commissioner of Indian Affairs to Secretary of Interior, January 13, 1888, H.R. Rep. No. 82, 51st Cong., 1st Sess. 2, 3 (1890).

Therefore, because of this overlap, Respondent would submit that the legislative history of each of the other agreements could be utilized by this Court to establish what precise principles of the cession era Congress intended to retain by tailoring certain cession agreements to conform with the provisions of the Dawes Act of 1887. Because the agreements ratified by the Act of March 3, 1891, were concluded both before and after the Dawes Act and the final debates were not until 1891, four years after the Dawes Act had been in effect, all of these documents should contain material that could be very useful to this Court in deciding the issue in the instant case.

In this respect, Respondent would most certainly be pleased to assist this Court at any time by filling a supplementary brief containing the legislative history and surrounding circumstances of not only each of the other agreements that were ratified by Congress in the Act of March 3, 1891, but also of the Dawes Act of 1887, if this Court

so desires. As Respondent stated in the Memorandum for Respondent's Concurrence That Certiorari Be Granted, the importance of the issue which is presented herein is beyond question, and someone, somewhere, must take the necessary time and action to authoritatively ascertain the intent of Congress at the turn of the century. Memorandum for Respondent's Concurrence that Certiorari Be Granted, *DeCoteau v. District County Court*, No. 73-1148 (1971).

II

THE ANNUAL REPORTS OF THE COMMISSIONER OF INDIAN AFFAIRS AND THE SECRETARY OF THE INTERIOR CONCLUSIVELY ESTABLISH THAT CONGRESS DID NOT ALTER THE FUNDAMENTAL PRECEPT OF CESSION AGREEMENTS BY SIMPLY TAILORING THE AGREEMENTS TO THE DAWES ACT OF 1887: THE 1891 ACT DISESTABLISHED THE LAKE TRAVERSE RESERVATION BY RESTORING ALL UNALLOTTED LAND THEREIN TO THE PUBLIC DOMAIN.

Respondent has previously alluded to the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior in those instances wherein it was unambiguously and specifically set forth that the Act of March 3, 1891, restored the unallotted land to the public domain and thereby disestablished the Lake Traverse Reservation. *See* 7, 8, 66, *supra*. By way of Appendix II, Respondent has extensively set forth *representative* excerpts from these reports for the convenience of the Court. An examination of the contents and tenor of the materials therein not only serves to put the 1891 Act in a proper historical perspective but also clarifies many of the peripheral questions inherent in a resolution of an issue similar to the one presented herein. Although subsequent Acts of Congress, as well as decisions of this Court, have altered the consequences of some of the prevalent conceptual aspects of the 1887 Dawes Act, such as the status of the allottee as a ward or citizen, the contemporaneous understanding at the time of passage sheds considerable light

on the effect Congress and the Department of the Interior intended the surplus land statutes to have on the areas of reservations so affected. These, as well as other portions of Appendix II, will be alluded to *infra*.

In addition thereto, the same Reports, in the most sweeping and general terms, conclusively substantiate the position of Respondent that in 1889 an Indian land cession was still an Indian land cession — irrespective of the fact that it may have been tailored to the Dawes Act of 1887. In 1889 agreements for cessions of reservations, a portion of which had been allotted, continued to be negotiated by the Department of the Interior with various Indian tribes and ratified by Congress. Most importantly, with respect to the issue in the instant case, the ratified cession agreement continued to disestablish reservations or portions thereof by the restoration of the surplus lands to the public domain.

If the cession included the surplus unallotted land of only a portion of the reservation, then only a portion of the reservation was disestablished with the allotments in the area ceded left on the public domain outside of the boundaries of the diminished reservation. This was the case in both the hypothetical and Crow opening, *supra*.

If the cession included all of the surplus unallotted land of the entire reservation, then the entire reservation as such was disestablished with all of the allotments in the area ceded left on the public domain outside of the boundaries of any reservation. This was the case in the other hypothetical, *supra*, and represents the precise effect of the 1891 Act on the Lake Traverse Reservation in the instant case.

In short, in 1885 an Indian land cession disestablished and restored Indian reservations or portions thereof to the public domain. For purposes of presentation in the text of this brief, only a portion of the excerpts set forth in Appendix II are

reproduced below. Nevertheless, they should serve not only to recapture the continuity of that policy in 1891 under the Dawes Act of 1887, but also should substantiate the congressional materials in Part I, *supra*.

1A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H. EXEC. DOC. 48TH CONG., 2D SESS. (1884) (EMPHASIS ADDED).

> *Crows.* — Since my last report was made, the Crow Indians, whose reservation in Montana is estimated to contain 4,713,000 acres, have been removed from their old location in the western part of the reservation to the valleys of the Big Horn and the Little Big Horn rivers. At 5.
>
> Not only has this been done, *but it has thus been made possible to add to the public domain* at least 3,000,000 acres of this reservation, leaving still all the land necessary for the use and occupancy of this tribe of Indians. If this 3,000,000 acres are so disposed of as to give the Crows some benefit of the proceeds thereof, they will no longer require any aid from the Government, and thus one fraction of the Indian problem will have been solved, and an example and incentive given to other tribes of Indians to do likewise. At 5-6.
>
> It having been represented to the Department that the Sisseton and Wahpeton and the Yankton bands of Sioux were desirous of disposing of a limited portion of their respective reservations, the Sioux Commission were instructed, under date of May 10th last, to visit said reservations and ascertain if such was the case, and if so to negotiate with them as to the quantity they would *cede*, the conditions as to the price, etc. No report has been received from them up to this date, but the agent for the Sisseton and Wahpeton bands reports that his Indians are unwilling to part with any of their lands, and that the visit of the Commission was unsuccessful. At 30-31.

1B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 48TH CONG., 2D SESS. (1884) (EMPHASIS ADDED).

> If the reservation is larger than is required for the use of the Indians occupying it, there should be a reduction thereof, and all that is not needed for the use of the Indians should be opened to settlement. The time has passed when large and valuable tracts of land fit for agriculture can be held by Indians for either hunting or grazing lands to the exclusion of actual settlers. At 7.
>
> In my last report I called attention to the magnitude of this reservation, and urged that it should be reduced by a purchase of about 18,000 square miles, as proposed by the commission appointed in 1882. At 13.
>
> This reservation is much larger than required for their support. The reservation is situated in the Territory of Montana, and contains 7,364 square miles, or 4,713,000 acres of land. At least 3,000,000 acres might be disposed of, . . . at 13.

2A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H. EXEC. DOC. 49TH CONG., 1ST SESSION (1885) (EMPHASIS ADDED).

> This brings me directly to the consideration of the practical policy which I believe should be adopted by Congress and the Government in the management of the Indians. It should be industriously and gravely impressed upon them that they must abandon their tribal relations and take lands in severalty, as the corner-stone of their complete success in agriculture, which means self-support, personal independence, and material thrift. The Government should, however, in order to protect them, retain the right to their lands in trust for twenty-five years or longer, but issue trust patents at once to such Indians as have taken individual holdings. When the Indians have taken their lands in severalty in sufficient quantities (and the number of acres in each holding may and should vary in different localities according to fertility, productiveness, climatic, and other advantages), then having due regard to the immediate and early future needs of the Indians, *the remaining lands of their reservations should be purchased by the Government and opened to homestead entry at*

50 or 75 cents per acre. The money paid by the Government for their lands should be held in trust in 5 per cent bonds, to be invested as Congress may provide, for the education, civilization, and material development and advancement of the red race, reserving for each tribe its own money. This is all the Indians need to place them beyond the oppression and greed of white men who seek, as Mr. Barbour said in 1825 in his report as Secretary of War, "to bereave the Indians of their lands." At 4.

Assuming, however, that I have correctly divined the almost unanimous wish of the States mentioned, and that Congress would feel disposed to respect their wishes, then the further question of purchasing from the Indians all of the lands of the Indian Territory, *and of other Indian reservations*, which the Indians do not need now, or will not need in the early future, and of *opening them to homestead settlement*, presents itself for consideration. At 11-12.

THE KLAMATH RIVER INDIANS IN CALIFORNIA.

They do not need all the lands at present reserved for their use, but they should be permanently settled, either individually or in small communities, and their lands secured to them by patent *before* any portion of their reservation is *restored to the public domain.*

ROUND VALLEY RESERVATION IN CALIFORNIA.

This reservation was first selected for Indian purposes in 1856, and according to the survey made in 1860, comprised 25,030.8 acres (being the entire Round Valley), of fertile and productive land. Under the act of March 3, 1873 (17 Stat., 633), the boundaries of the reservation were changed, and the southern portion of the valley *thrown open to settlement*, leaving between 5,000 and 6,000 acres of it within the reservation. At 49.

The reduction of their reservation to two townships has caused some dissatisfaction, and they have asked for more land; . . . If they have suffered any wrong, as is claimed, on account of *the restoration to the public domain* of the Turtle Mountain country, by which is meant that vast

territory lying north of Devil's Lake and west of the Red River of the North, the remedy is with Congress. At 53.

2B. REPORT OF THE SECRETARY OF THE INTERIOR, VOL. 1 (1885) (EMPHASIS ADDED).

The question as to what is the best and wisest course to pursue relative to these surplus lands in the Indian reservations not required for the present wants of the Indians is one demanding careful and serious consideration. . . . If, however, it shall be decided that the welfare of the Indians as well as the public interests will best be served by opening the surplus lands of these reservations to public settlement, it should be done in good faith under the general land laws of the United States. At 19.

ESTATE OF THE INDIANS.

I favor the policy recommended by a predecessor in this office, Secretary Kirkwood, of reducing to proper size the existing reservations, when entirely out of proportion to the number of Indians thereon, with the consent of the Indians, and upon just and fair terms; and second, of placing by patent the titles to these *diminished reservations* as fully under the protection of the courts as are titles of all others of our people to their lands. *The surplus portion cut off should be subject to sale* and the proceeds invested for the benefit of the Indians. The execution of it should be cautious and tentative. At 26.

He also recommends the *compression* of Indian reservations and *opening* the surplus to settlement, and cites the condition of those on the *Sisseton Reservation* who occupy separate tracts of land and are self-supporting, maintain churches and schools, and live in comfortable houses. At 78.

3A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1886) (EMPHASIS ADDED).

The practical proposition which it seems to me would be best for these Indians would be to *divide their lands* in severalty upon the basis I have

suggested, or upon some other reasonable basis, and to *sell the remainder to actual settlers* at a fair and just price. At VIII.

The *general allotment* bill again passed the Senate at the last session, and was favorably reported in the House of Representatives. As there seems to be no substantial opposition to this bill, it is hoped that it will be come a law during the coming winter. Its passage will relieve this office of much embarrassment and enable it to make greater progress in the important work of assisting the Indians to become individual owners of the soil by an indefeasible title. At XX.

3B. REPORT OF THE SECRETARY OF THE INTERIOR, VOL. I (1886) (EMPHASIS ADDED).

I wish I could say that the progress in this direction is sufficiently rapid to promise an early accomplishment of the policy of the Government in reference to our Indian population. That policy, as I understand it, is the incorporation of the Indian race into our political and social system as citizens. . . . As I stated in my last report, the only alternative now presented to the American Indian race is speedy entrance into the pale of American civilization, or absolute extinction. At 4.

The Indians have seen the wide ranges of territory occupied or claimed by them gradually but surely narrowed to smaller limits . . . at 6.

NEGOTIATIONS WITH INDIANS.

The negotiations authorized by the act approved May 15, 1886, making appropriations for the Indian service, to be made with certain bands or tribes in Minnesota, North Dakota, and Montana, concerning their existing treaties and reservations, and with other Indians in Washington and Idaho Territories for their removal to certain designated reservations and *cession* of certain lands, have been entrusted to a commission appointed during July last, . . . At 13.

By Executive order of May 1, 1886, the land embraced within the Columbia Reservation in Washington Territory, except the tracts occupied by and allotted to the Indians thereon, was restored to the *public domain*, . . . At 14.

4A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1887) (EMPHASIS ADDED).

ALLOTMENT OF LAND IN SEVERALTY.

The *general allotment act*, the plan of which was first suggested in the annual report of this office for 1878, became a law on the 8th of February last. I have deemed it a matter of public interest and convenient reference to submit in this report not only the full text of the act, which will be found on page 274, but also an abstract of its provisions, which are as follows: . . .

After lands have been allotted to all Indians of a tribe (or sooner if the President thinks best), the Secretary of the Interior may negotiate with that tribe for the sale of any of their unallotted lands, such negotiations to be subject to ratification by Congress. . . .

In case lands are thus sold, the purchase money to be paid therefore by the United States shall be held in the United States Treasury in trust for that tribe, at 3 per cent interest, which interest shall be subject to the appropriation by Congress for the civilization of said tribe. . . .

All lands adapted to agriculture released to the United States by Indian tribes shall be disposed of only to bona fide settlers, in tracts not exceeding 160 acres (subject to grants which Congress may make in aid of education), and no patents shall issue to any such settler or his heirs for such lands until after five years' continuous occupancy thereof as a homestead, and any conveyance of or lien on said land prior to the issuance of patent thereto shall be null and void. At IV and V.

The President has wisely ordered that allotments be made only on reservations where the Indians are known to be generally favorable to the idea, and the following have thus far been selected: Papago and Pima (Salt river), Arizona; L'Anse and Vieux de

Sert, Michigan; Lac Court d'Oreilles, Bad River, Red Cliff, and Lac du Flambeau, Wisconsin; Fond du Lac, Minnesota; Lake Traverse, Devil's Lake, Ponca, and Yankton, Dakota; Nez Perce, Idaho; Crow, Montana; Absentee Shawnee, Pottawatomie, Quapaw, Modoc, Ottawa, Shawnee, Seneca, and Wyandotte, Indian Territory; Winnebago, Nebraska; Siletz, Grande Ronde, and Warm Springs, Oregon; and Muckleshoot, Washington Territory. At VI and VII.

I fail to comprehend the full import of the allotment act if it was not the purpose of the Congress which passed it and of the Executive whose signature made it a law ultimately to dissolve all tribal relations and to place each adult Indian upon the broad platform of American citizenship. Under this act it will be noticed that whenever a tribe of Indians or any member of a tribe accepts lands in severalty the allottee at once, *ipso facto*, becomes a citizen of the United States, endowed with all the civil and political privileges and subject to all the responsibilities and duties of any other citizen of the Republic. At XXIX.

To enable the Secretary of the Interior to *negotiate* with the several tribes and bands of Chippewa Indians in the State of Minnesota for such modification of existing treaties with said Indians and such change of their reservations as may be deemed desirable by said Indians and the Secretary of the Interior, and as to what sum shall be a just and equitable liquidation of all claims which any of said tribes now have upon the Government; and also to enable said Secretary to *negotiate* with the various bands or tribes of Indians in northern *Montana* and at *Fort Berthold*, in Dakota, for a reduction of their respective reservations, or for removal therefrom to other reservations; and also to enable said Secretary to negotiate with the upper and middle bands of Spokane Indians and Pend d'Oreille Indians, in Washington and Idaho Territories, for their removal to the Colville, Jocko, or Coeur d'Alene reservations, with the consent of the Indians on said reservations; and also to enable said Secretary to negotiate with said Indians for the *cession* of their lands to the United States; and also to enable said Secretary to negotiate with the Coeur

d'Alene Indians for the *cession* of their lands outside the limits of the present Coeur d'Alene reservation to the United States, $15,000, or so much thereof as may be necessary, to be immediately available; but no agreement shall take effect till ratified by Congress. At XXVII and XXVIII.

The next Indians visited by the Commission were the Arickarees, Gros Ventres, and Mandans, of the Fort Berthold agency in Dakota, with whom an agreement was concluded January 11, 1887. By the terms of the agreement, the Indians *cede* about 1,600,000 acres of their reservation for the sum of $800,000, . . . *The agreement also provides for the allotment of lands in severalty to said Indians within the diminished reservation.* . . .

The Indians in northern Montana, belonging to the Fort Peck, Fort Belknap, and Blackfeet agencies, were the next visited by the Commission. These Indians occupy a reservation estimated to contain 33,830 square miles, or 21,651,000 acres. The agreement entered into with them provides for the *cession* to the United States of about 17,500,000 acres, and leaves three separate reservations of sufficient area, it is believed, to meet all their present and prospective wants. At XXIX.

A portion of the lands set apart to the Pawnees as a reservation, under the act of April 19, 1876 (19 Stats., 28), comprising 53,005.96 acres, was *ceded* to the United States by the Creeks by the third article of the treaty of June 14, 1886 (14 Stats., 785). At LXIV.

4B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 50TH CONG., 1ST SESS. (1887-1888) (EMPHASIS ADDED).

And I can only reiterate the conviction expressed in former re. orts, that the Indian race has reached a crisis in its history. Surrounded on all sides by the forces of civilization; all the reservations closed in and pressed upon by ever-increasing masses of population, made up of impetuous, daring, and aggressive settlers, miners, ranchmen, and traders; with no possibility of removal to other reservations or of escape into mountain fastnesses, the only

alternative presented to the Indian race is absolute extinction or a quick entrance into the pale of American civilization. At 25.

The most important measure of legislation ever enacted in this country affecting our Indian affairs is the general allotment law of February 8, 1887. By this law every Indian, of whatever age, may secure title to a farm, enjoy the protection and benefits of the law, both civil and criminal, of the State or Territory in which he may reside, and be subject to the restraints of those laws. At 25-26.

The argument that this legislation or the measures adopted under it should be postponed until the race by gradual process is morally and intellectually adapted to the condition of civilized society is conclusively answered by the fact that a century of effort to so adapt them has produced nothing in that direction which promises any such fitness within a century to come. The exigencies of the age will not await another century or even a quarter of a century of such expenditure of effort and time with such incommensurate results. At 26-27.

NEGOTIATIONS WITH INDIANS.

Agreements were also negotiated by the Commission with the Indians belonging to the Fort Peck, the Fort Belknap, and the Blackfeet agencies, in Northern Montana, for *cession* of about 17,500,000 acres of territory, leaving about 4,151,000 acres to be divided into three separate reservations of sufficient area to meet the wants of the Indians now inhabiting that portion of the large reservation in Northern Montana. The compensation agreed upon for the land proposed to be ceded by this agreement is $4,300,000, . . .

As a summary of the labors of the Commission it is estimated that agreements negotiated provide for *cession* to the United States by the Indians of nearly 22,000,000 acres of territory, besides the surrender by certain tribes of claims to large areas of territory, the quantities and limits of which are rather indefinite and undefined. At 38-39.

The Commission appointed under the [illegible] of March 3, 1885, for the purposes therein required, has made its report, showing that the Umailla, Walla Walla, and Cayuse Indians of Oregon have consented to the provisions of the law for diminishing the area of their reservation, taking lands in severalty, and for sale of their surplus lands for their benefit. They determined and set apart a diminished reservation embracing an area of 119,864 acres, for agricultural, pasture, timber, and school farm lands for the Indians. At 39.

5A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1888) (EMPHASIS ADDED).

On the Lake Traverse Reservation (Sisseton Agency) in Dakota, all the Indians entitled thereto have received allotments, except some 25, and most of these have selected their tracts and will soon receive their allotments. The schedules of allotments already made were certified to by this office on May 10, 1888. They were transmitted to the Secretary and by him approved, and the Commissioner of the General Land Office was directed to cause patents to issue to the allottees, as provided in the fifth section of the severalty act. There remains on the reservation 788,900 acres of unallotted lands, of which surplus the Indians desire to dispose of some portion, and it would doubtless be greatly to their advantage to do so; but no funds are available to defray the necessary expenses of negotiations with them for this purpose. . . .

The coming on of the winter of 1887-'88 necessitated the discontinuance of allotment work on the Siletz, Yankton, Crow and Winnebago Reservations, and for want of funds it could not be resumed in the spring. Work was discontinued on the Absentee Shawnee and Pottawatomie Reservations on the 3d of April last, and for the same reason has not been resumed. At XXXVII.

On the Sisseton Reservation only have allotments been practically completed. . . .

Progress of allotment work elsewhere has been slow, owing to the time required to make surveys preliminary to allotting, and the late date at which the appropriation bill passed. . . .

Considerable opposition to the allotment policy has been developed from two sources. Those who believe in the wisdom of tribal ownership, and in the policy of continuing the Indian in his aboriginal customs, habits, and independence, oppose it because it will eventually dissolve his tribal relations and cause his absorption into the body politic. On the other hand, those who expected that the severalty act would immediately open to public settlement *long-coveted* Indian lands, oppose it because they have learned that these expectations will not be realized. At XXXVIII.

The authority under which, for the past five or six winters, these Indians have cut and marketed their dead-and-down timber has been granted each year by the Department, on recommendation of this office, said recommendation being based on a decision rendered May 19, 1882, by Hon. H. M. Teller, then Secretary of the Interior, in regard to the right of the Sisseton Agency Indians to market such timber from their reservation in Dakota. The decision was as follows:

Sir: I have your letter of the 18th ultimo, asking that I approve of the application of Agent Crissey, of the Sisseton Agency, to allow the Indians on that reservation to cut dead and fallen timber and to sell the same. The Indians of that agency hold their reservation by virtue of a treaty made with the United States in 1867. It is recited in the treaty that, in consideration of certain cessions made by the Indians to the United States and the faithful conduct of the Indians, the Government set apart the reservation for the use of said Indians as a permanent home. It is not claimed, however, that these Indians hold by other and different title from other Indians who occupy their reservations by treaty stipulations. . . .

The fee to the reservation is in the Government, and the right of the Indians to the occupation thereof is as unquestioned as the right of the Government to the fee. In such occupation they can not be disturbed by the Government, save through its legislative department; and it ought not to be supposed that such occupation will be interfered with without the consent of the Indians, unless, by misconduct on their part, the right to occupy should be lost. At XLIII-XLIV.

It proposed to set off from the Sioux Reserve five separate reservations for the Rosebud, Pine Ridge, Lower Brule, Cheyenne River, and Standing Rock Indians, respectively, and to reduce the Crow Creek Reserve (which is separated from the Sioux Reserve by the Missouri River), *and to restore the remaining lands of these two reservations to the public domain. By the boundaries proposed the lands restored would amount to over 11,000,000 acres and the lands retained to a little less than 11,000,000 acres. . . .*

The Indians were to have lands allotted to them in severalty and to receive patents therefore. . . .

The lands restored to the public domain were to be sold to settlers under the provisions of the homestead acts for 50 cents per acre, but $1.50 was to be paid for lands entered for town-site purposes. At LXXIII-LXXIV.

5B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 50TH CONG., 2D SESS. (1888-1889) Vol. 10. (EMPHASIS ADDED).

A beginning has already been made upon another line of policy, from which much appears justifiably to be hoped — the complete dispersion of the tribes and bands by the establishment of individuals as landowners, and the investment of them with the dignity, rights, and privileges of citizenship in the State and nation. At another point I will exhibit what has been accomplished during the past year in the prosecution of this policy. At XXXI.

"INDIAN COUNTRY.

The entire extent of territory *now* in a state of reservation for Indian purposes, including all portions of the Indian Territory, whether in fact occupied or unoccupied by Indians, is 112,413,440 acres; being equivalent to an average of 456 acres for each Indian, computed on the last reported number of the total population, including those estimated as outside the reservations. Of this area, about 81,020,129 acres are within the scope of the *general allotment law of 1887*, and afford an average for the population residing upon such lands, amounting to 173,985, of about 465 acres to

each. *It will be seen that, by the execution of the general allotment law and breaking up of the reservations a wide area of the public domain will be opened to settlement.* . . . At XXXIV.

The work of allotting lands in severalty to Indians which was begun, under the provisions of the act of February 3, 1887 (24 Stats., 388), on seven reservations, the Yankton and *Lake Traverse Reservations* in Dakota Territory, the Winnebago Reservation in Nebraska, the Pottawatomie Reservation in the Indian Territory, the Crow Reservation in Montana, the Fond du Lac Reservation in Minnesota, and the Siletz Reservation in Oregon, was suspended early in 1888, because the funds appropriated for employment of the special agents, and for other expenses incident thereto, had been exhausted. . . .

On the Lake Traverse Reservation the field work had been completed, allotments were made to each Indian belonging thereon, and the schedules of the allotments were presented to this Department for approval and for instructions for patents to be issued to the allottees. At XXXIX.

THE GREAT SIOUX RESERVATION.

By the treaty of 1868 with various bands and tribes of the Sioux nation of Indians — a treaty which, in all the circumstances of its negotiation, as the final composition of bloody disturbances of long continuance urged on the part of the Government by citizens and officers of the Army of the first rank and character, as well as by unusually solemn and particular expressions of engagement, is peculiarly stamped with the obligation of observance by the United States — a reservation of very large extent, then comprehending the most of the Territory of Dakota lying west of the Missouri, was established to be a perpetual home for these people, with specific guaranty on the part of the Government that no white man should be allowed to enter it, to pass through it or across it, without the consent of the Indians first had and obtained; and with the further clause in the twelfth article that — . . .

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as

against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same. . . .

In *1876* an agreement was made by which the Sioux relinquished a portion of this reservation, embracing the Black Hills country and some territory to the northward, and that agreement was ratified by Congress, although it does not appear to have received the consent, by signature, of three-fourths of the Indians as required under the treaty of 1868. The reservation as so reduced, however, contains a little more than 22,000,000 acres, and there is now upon it a population exceeding 23,000 Indian people, who are rationed and governed through five agencies provided by law and located upon the reserved territory. . . .

The act of the present Congress, approved on the 30th of April, 1888, contains elaborate provisions, the general purposes of which are to reduce the reserved area into six separate reservations and *cede* the remainder, above 11,000,000 acres, to the Government; to open the *ceded portion* to homestead settlement, except so far as shall be necessary for the uses of two railroad companies who have made agreements with the Sioux heretofore for rights of way and station-grounds; to collect from homesteaders upon making final proof, for the use of the Indians, fifty cents per acre of the lands homesteaded, to apply the proceeds to the education and civilization of the Indians, and facilitate the allotment of the separate reservations in severalty and their establishment in independence thereon, extensive advancements being, in the mean time, authorized for these purposes; and to so administer their affairs that, in the end, the people of this nation may be reclaimed from barbarism and established in citizenship. At LVI.

As has been said, the price proposed seemed inadmissible. It would require for nor more land than is now desired to be *ceded* the payment of nearly as much money as was paid to France for the entire territory of Louisiana, merely to extinguish the Indian right of occupancy, the fee being, according to our theory, already in the Government. It would, besides, fix a probable minimum, at least, for the

several millions of acres which must, at a later period, after allotments in severalty have been perfected and their improved condition thereunder shall warrant it, *be further purchased and opened to settlement*.

The policy of Congress is wisely declared by the act to require the disposition of these lands only to homestead settlers, to be paid for after the full period of five years' residence and improvement, which now entitled homesteaders *upon the public domain elsewhere* to a patent without price. At LXIV-LXV.

The other features of the proposed amendments require no further explanation of the reasons for making them than is suggested by their reading, to one who is acquainted with the circumstances. . . .

Attention is invited to the interesting information and full presentment of the various aspects of the problem of *opening this reservation* in the elaborate report of the Commission, which is appended hereto. It appears satisfactorily that, restricted to the sole means of argument and explanation, their full duty was done in their submission of the act. At LXVI.

AGREEMENTS NEGOTIATED WITH INDIANS IN THE STATE OF MINNESOTA AND IN DAKOTA, MONTANA, IDAHO, AND WASHINGTON TERRITORIES.

The agreement entered into with the Gros Ventre, Piegau, Blood, Blackfeet, and River Crow Indians in Montana, for dividing a portion of their reservation into three separate reservations for the use and occupation of the Indians belonging respectively to the Fort Peck Agency, the Fort Belknap Agency, and the Blackfeet Agency, and for relinquishment of the Indian title to the remainder, was ratified by act of Congress approved May 1, 1888. The result of this agreement is the *extinguishment of the Indian title* to a vast area of country, estimated at about 17,500 acres, . . .

These Indians for whom appropriations have heretofore been made for their support, as a gratuity from the Government, will now receive the benefits of such appropriations made as payment of consideration money for the *portion of their territory ceded* by the agreement. At LXVII.

And that this will remain so for many years to come is apparent, when it is considered that *in addition* to 22,000,000 acres of vacant public land open to settlement there are 27,000,000 acres of land in Dakota *within the reservations of the Indian tribes, which will sooner or later be opened*. At CXXII.

6A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1889) (EMPHASIS ADDED).

Unexpectedly called to this responsible position, I entered upon the discharge of its duties with a few simple, well-defined, and strongly-cherished convictions: . . .

First. — The anomalous position heretofore occupied by the Indians in this country can not much longer be maintained. *The reservation system belongs to a "vanishing state of things" and must soon cease to exist*. . . .

Second. — The logic of events demands the absorption of the Indians into our national life, not as Indians, but as American citizens. At 3.

This whole reservation system is an abomination that should cease to exist. At 8.

During the year 1,341 patents have been issued to the Indians of the Lake Traverse Reservation in Dakota, which will be delivered at an early day. The allotment of lands on this reservation having been practically completed, recommendation was made June 21, 1889, that an officer or officers be designated to *negotiate for the relinquishment of such portion of the surplus lands as the Indians might be willing to cede*, and instructions for the guidance of such commission have been prepared and submitted for your approval. At 16.

The second great economical fact is that the lands known as Indian reservations now set apart by the Government for Indian occupancy aggregate

nearly 190,000 square miles. This land, for the most part, is uncultivated and unproductive. When the Indians shall have been properly educated they will utilize a sufficient quantity of those lands for their own support and will *release the remainder that it may be restored to the public domain* to become the foundation for innumerable happy homes; and thus will be added to the national wealth immense tracts of farming land and vast mineral resources which will repay the nation more than one hundred fold for the amount which it is proposed shall be expended in Indian education. At 112.

6B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 51st CONG., 1ST SESS. VOL. II (1889-90) (EMPHASIS ADDED).

Thus the aggregate of these *two cessions* is 5,439,-865.60 acres. By the thirteenth section of this appropriation act, provision was made that the lands so acquired, except the sixteenth and thirty-sixth sections, should be *opened for settlement by proclamation of the President, and disposed of to actual settlers under the homestead laws only.* At IV.

THE SIOUX COMMISSION.

With the allotments the reservation disappears, for after the allotments are made what remains is sold to the Government and the proceeds thereof become a trust fund, the interest on which is paid to the particular tribe, thus producing a reliable annual income. At L.

7A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1890) (EMPHASIS ADDED).

The Indians, with whose welfare and civilization he is charged, are widely scattered, and the territory in what is known as Indian reservations embraces not less than 181,000 square miles. At V.

It has become the *settled policy* of the Government to *break up reservations,* destroy tribal relations, settle Indians upon their own homesteads, incorporate them into the national life, and deal with them not as nations or tribes or

bands, but as individual citizens. The American Indian is to become the Indian American. How far this process has advanced during the past year will be shown under the head of the *reduction of reservations* and allotment of lands. At VI.

It was further settled in the case of the Cherokee Nation *v.* The State of Georgia (5 Peters, p. 1) that the Indians had an unquestionable and theretofore an unquestioned right to the lands they occupied *until* that right of occupancy was extinguished by voluntary *cession* to the Government; . . . at XXIII.

REDUCTION OF RESERVATIONS.

At the date of the last annual report of this office there were one hundred and thirty-three Indian reservations in the United States (counting the twenty-two small reserves of the Mission Indians of California as one only and the nineteen Pueblo reserves in New Mexico also as one), having an aggregate area of about 116,000,000 acres or 181,250 square miles, which is greater than that of the New England and Middle States combined, greater than the aggregate area of the States of Ohio, Indiana, Illinois, and Kentucky, and nearly equal to the combined area of the two Dakotas and Montana. To carry the comparison further, it is larger by half than the United Kingdom of Great Britain and Ireland, larger than Sweden or Norway, and nearly as large as either France or Spain. The total Indian population of the United States, exclusive of Alaska, was, by the census of 1889, 250,483, and exclusive of the five civilized tribes in Indian Territory, 185, 283. At XXXVII.

Where it is suitable for agricultural or grazing purposes, it is the present policy of the Government to allot land in severalty to the Indians within their respective reservations . . . to patent these individual holdings, with a restriction against alienation for twenty-five years, or longer, in the discretion of the President, and to purchase from the respective tribes any or all of the surplus land remaining after the allotments have been made. The general law for this is the allotment act of February 8, 1887 (24 Stat. p. 388), applicable to all reservations, except . . . at XXXVIII.

In numerous instances, where clearly desirable, Congress has by special legislation authorized negotiations with the Indians for portions of their reservations without waiting for the slower process of the general allotment act, which involves the survey of the land, the allotment in severalty by special agents appointed by the President for that purpose, and negotiations with the Indians for the cession and relinquishment of their surplus unallotted lands. . . .

It is estimated that under such special legislation about 13,000,000 acres of land have been secured by cession from the Indians during the past year; and there are agreements now pending before Congress, through which, if ratified, the Government will acquire some 4,500,000 acres more; all of which will, under the operation of these laws, be open *to white settlement* in the near future. . . .

Of the land actually acquired, about 9,000,000 acres are in North and South Dakota, secured from the Sioux (act of March 2, 1889, 25 Stat., p. 888), and about 4,000,000 acres in Minnesota,* acquired from the Chippewas (act of January 14, 1889, 25 Stat., p. 642). *The agreements now pending in Congress will, if ratified, restore to the public domain* about 1,600,000 acres in North Dakota, in the Fort Berthold Reservation; about 660,000 acres in South Dakota, in the *Lake Traverse* (Sisseton,) *Reservation;* about 185,000 acres in Idaho, in the Coeur d'Alene Reservation; about 1,095,000 acres in Colorado, being the whole of the southern Ute Reservation; and about 941,000 acres in Oklahoma Territory, now embraced in the Pottawattomie, Iowa, and Sac and Fox Reservations; a grand total of upwards of 17,400,000 acres, or *about one seventh of all the Indian lands in the United States.* . . .

The Chippewas ceded all of their lands in Minnesota embraced in the several reservations occupied by them, except the White Earth Reservation, of which they ceded four entire townships, and excepting also the Red Lake Reservation, of which they ceded perhaps three-fourths, but it can not be ascertained how much or just what particular portions of said reservations, except White Earth and Red Lake, have actually been relinquished to the United States until the Indians shall have selected and received the allotments to which they are entitled under said act. At XXXVIII-XXXIX.

This might seem like a somewhat rapid reduction of the landed estate of the Indians, but when it is considered that for the most part the land relinquished was not being used for any purpose

whatever, that scarcely any of it was in cultivation, that the Indians did not need it and would not be likely to need it at any future time, and that they were, as is believed, reasonably well paid for it, the matter assumes quite a different aspect. The sooner the tribal relations are broken up and *the reservation system done away* with the better it will be for all concerned. . . .

As a general rule, I would not advise the purchase of the surplus lands until the Indians have been located upon and absolutely secured in their individual holdings. At XXXVIII-XXXIX.

As already stated, the general allotment act of February 8, 1887, confirms the Indian title in all existing reservations. It provides that in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use, "either by treaty stipulation or by virtue of an act of Congress, or by executive order, setting apart the same for their use," the President of the United States may, whenever in his opinion any reservation or any part thereof is suitable for the purpose, allot the lands of said reservation in severalty to the Indians located thereon, in quantities as specified; and that after lands shall have been so allotted, or sooner, if in the opinion of the President it shall be for the best interests of the Indians, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall from time to time consent to sell, "upon such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians." . . .

I desire to ask special attention to the *great importance* of the early ratification of agreements made with Indians for the *cession of portions of their reservations.* Delay in such matters is not understood by them, often works hardship, creates unrest, begets distrust, and greatly retards their progress. It should be remembered that while these agreements often involve the appropriation of large sums of money, the amount is almost wholly reimbursable from the sale of the land.

CHIPPEWA INDIANS IN MINNESOTA.

Since the date of the last annual report, the 1341 patents issued to the Sisseton and Wahpeton Indians, on the Lake Traverse Reservation, in North and South Dakota, have been delivered to the Indians. The agreement, however, for the cession of their surplus lands now pending in Congress, provides for additional allotments, so that each Indian belonging to the reservation shall have 160 acres of land. At XLV.

The division of Indian lands in severalty and the ultimate *destruction* of the tribal and *reservation systems* being inevitable, the Indians should be taught to look forward to this and be prepared, so far as practicable, to meet it. At LXIX.

7B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 51ST CONG., 2D SESS. (1890-91) (EMPHASIS ADDED).

And again, while this Territory has been forming, *great additions from the Indian reservations have been made to the public domain* soon to be opened to settlement. The various Indian commissions have made *agreements*, now awaiting Congressional action, with different tribes for many *millions of acres*. At I.

INDIAN AFFAIRS

But it needs to be said that a much larger area of land than is necessary is held for Indian occupancy.

. . .

There has been a *reduction* during the fiscal year by *cession* of Indian title to reservations under ratified agreements to the extent of about 13,000,000 acres of lands heretofore held by them, leaving the aggregate area of reserved land at this time over 103,000,000 acres. . . . *The surplus held in reservation appears therefore to be unreasonably large. A large portion of it is lying idle, and is a bar to the Indians' progress, and our country's development. To restore this to the public domain* will work no hardship to the Indians, if the *cessions* are made

upon terms as fair as have characterized the agreements recently negotiated. At XXIII-XXIV.

INDIAN CESSIONS.

THE GREAT SIOUX IN NORTH AND SOUTH DAKOTA.

THE CHIPPEWAS IN MINNESOTA. At XXVI.

OTHER CESSIONS MADE.

There are pending in Congress agreements as follows: For the cession of about 1,600,000 acres of the Fort Berthold Agency Reservation in North Dakota, negotiated under provisions of the act of May 15, 1886 (24 Stats., 44); for about 184,960 acres of the Coeur d'-Alene Reservation in Idaho, negotiated under the act of March 2, 1889 (25 Stats., 1003); for about 600,000 acres of the Lake Traverse Reservation in South Dakota, negotiated under the provisions of section 5 of the general allotment act of February 8, 1887 (24 Stats., 388); for about 1,095,000 acres of the Southern Ute Reservation in Colorado, negotiated under the fourth section of the act of May 1, 1888 (25 Stats., 133), and for about 7,871 acres of the Flathead Indians in Bitter Root Valley, Montana, negotiated under the provisions of the act of March 2, 1889 (25 Stats., 871). These should all have early attention by Congress. At XXVII.

CESSIONS BY VARIOUS TRIBES THROUGH THE CHEROKEE COMMISSION.

OTHER COMMISSIONS TO NEGOTIATE *CESSIONS*

The appointment of the following commissions was also authorized during the last session of Congress: . . . at 28.

NORTHERN BAND OF CHEYENNES. At XXVIII.

TURTLE MOUNTAIN BAND.

WARM SPRINGS INDIANS. At XXIX.

CROW INDIANS. At XXX.

Under the authority contained in the fifth section of the general allotment law (24 Stats., 388) successful negotiations were conducted with the Sisseton Indians in South Dakota for the cession of their surplus lands, and the agreement entered into for this purpose, which was submitted to Congress early in the session, passed the Senate, but failed to receive favorable consideration in the House of Representatives. The failure to ratify this agreement is a matter to be greatly regretted. . . . At XXXV.

8A. SIXTEENTH ANNUAL REPORT OF COMMISSIONER OF INDIAN AFFAIRS (1891) (EMPHASIS ADDED).

If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the *public domain*, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. At 8.

The policy above outlined will eventually make all Indians citizens of the United States, when the *Indian reservation will no longer appear on our maps*, and the autonomy of the tribes, a fact to us, will be mere history to the generations that will come. At XXVI.

EARLY ALLOTMENTS.

The policy of dividing lands owned or occupied in common by an Indian tribe among its several members was inaugurated by act of March 3, 1839, which authorized division of the lands of the Brothertown Indians (Wisconsin) by a commission of five of their principal head men, and for the

issuance of patents in fee simply to the Indians and their heirs and assigns. . . .

PROGRESS IN ALLOTMENTS

In 1887 the first *general* law was enacted (24 Stats., 388), and by its provisions lands were to be given to the several members of a tribe (except married women), in quantities differing according to the age of the allottee, or status as the head of a family, or otherwise. At 40.

REDUCTION OF RESERVATIONS.

The work of reducing the area of the reservations, by extinguishing by purchase from the Indians their title to the land and its *restoration to the public domain*, has been carried forward rapidly, as is shown in the following detailed statements: . . .

Counting the 22 small reserves of the Mission Indians of California as only one reserve and the 19 Pueblo reserves of New Mexico as one also, the number of reservations as given in the annual report of this office for 1890 was 138, having an aggregate area of about 104,314,349 acres, or 162,991 square miles. This amount is about 12,071,380 acres, or 18,861 square miles, less than the amount reported in 1889, while at the present time there are five more reservations than in 1889, owing to the division of the Great Sioux Reservation, as provided by act of March 2, 1889. . . .

The agreements ratified by act of Congress approved February 13, 1891 (26 Stats., 749), *restored to the public domain* 391,184.65 acres from the Sac and Fox Reservations, in Oklahoma, including 25,194.61 acres for school purposes; and from the Iowa Reservation, in the same Territory, 219,446.27 acres, including 12,271.75 acres for school purposes. The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), *restored to the public domain* from the Pottawatomie Reservation, Oklahoma, 309,134.77 acres, including 22,650.44 for school purposes; from the Cheyenne and Arapaho Reservation, Oklahoma, about 3,000,000 acres; from the Coeur d'Alene Reservation, Idaho, about 185,000 acres; from the Fort Berthold Reservation,

North Dakota, about 1,600,000 acres; *from the Lake Traverse Reservation*, South Dakota, about 660,000 acres, and from the Crow Reservation, Montana, about 1,800,000 acres; a total of about 8,164,765 acres. At 44.

The *ceded portion* of the Fort Berthold Reservation, North Dakota, consisting of about 1,600,000 acres, has been *thrown open to settlement* by proclamation of the President. . . .

The *ceded lands* of the Coeur d'Alene Reservation, Idaho, were *opened to settlement* from the date of the approval of the act. . . .

Allotments of land are being made on the Lake Traverse Reservation, South Dakota, and the Cheyenne and Arapaho Reservation, Oklahoma, and surveys are in progress upon the Crow Reservation, Montana, and when they are completed and the terms of the act ratifying the respective agreements with the Indians of the several reservations shall have been fully compiled with, the unallotted or vacant lands embraced within the *ceded portions will be thrown open to settlement*. . . .

The agreement with the Indians of the Southern Ute Reservation, in Colorado referred to in my last annual report, was not ratified by the last Congress.

NEGOTIATIONS FOR FURTHER REDUCTIONS.

The Indian appropriation act for the fiscal year ending June 30, 1892 (26 Stats., 1010), contains the following provisions: . . .

To enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress, $15,000 or so much thereof as may be necessary. At 45.

RESERVATIONS SHOULD NOT BE REDUCED TOO RAPIDLY.

While perhaps it is possible to push such work too rapidly, I do not hesitate to say that the ultimate destruction of the entire system of reservations is inevitable. There is no place for it in our present condition of life, and it must go. The millions of

acres of Indian lands now lying absolutely unused are needed as homes for our rapidly increasing population and must be so utilized. Whatever right and title the Indians have in them is subject to and must yield to the demands of civilization. They should be protected in the permanent possession of all this land necessary for their own support, and whatever is taken from them should be paid for at its full market value. But it can not be expected under any circumstances that these reservations can remain intact, hindering the progress of civilization, requiring an army to protect them from the encroachments of home-seekers, and maintaining a perpetual abode of savagery and animalism. The Indians themselves are not slow to appreciate the force of the logic of events, and are becoming more and more ready to listen to propositions for the reduction of the reservations and the extinguishment of their title to such portions of the land as are not required for their own use. At 46.

. . . but the *breaking up of the reservations* and the coming of the white men with all their better modes of life necessitate a closer acquaintance with each other . . . at 47.

8B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 52ND CONG., 1ST SESS. VOL. 14 (1891-92) (EMPHASIS ADDED).

Sir: The years of the present administration have been marked to a notable degree by the expansion of the *public domain* for private settlement. European nations strive with one another to plant colonies beyond their borders, even in Africa and on distant islands; but our country is so fortunately situated that within its own boundaries are vast tracts of fertile land *heretofore unused*, on which communities can establish themselves in a single day, and be protected by an almost instantaneous but easy and peaceful application of our system of laws and government to their new relations. . . .

OKLAHOMA—NEW PURCHASES OPENED TO SETTLEMENT.

The peaceful and efficient overtures of the government have been met in an intelligent spirit by the different Indian tribes visited by Commissions, and for valuable considerations *large por-*

tions of their reservations have been ceded for settlement. Agreements were made by the Cherokee Commission during the previous fiscal year in the territory of Oklahoma with the Sacs and Foxes of the Mississippi, the Iowas, the Absentee Shawnees, and the Citizen Pottawatomies. These agreements were ratified by Congress at its last session. The allotments to the Indians were duly made, amounting in most cases to 160 acres each. At III.

By your proclamation dated September 18, 1891, all this domain, with required exceptions, was opened to settlement at the hour of 12 o'clock noon (central standard time), Tuesday, September 22. The lands can be acquired only by actual settlers under the homestead or town-site laws. At IV.

The agreement with these tribes made in October, 1890, and has been ratified by act of Congress. . . . As soon as the allotments are made there will be 3,000,000 acres ready upon your proclamation for settlement — equal to 18,750 homesteads of 160 acres each. At V.

A total of 27,619 Indians naturalized, and total of *acres acquired for settlement* of about 23,000,000 during the present administration alone.

He acquires a standing as complainant or otherwise in our courts on the same footing as other citizens, except as to his allotments which the government directly guards. At V-VI.

AGREEMENTS WITH INDIANS DURING THE PRESENT ADMINISTRATION.

The following table exhibits in condensed form the results of the successful labors of the various commissions negotiating with the Indians since the commencement of the present Administration, with dates of agreements, and a summary of lands purchased in Oklahoma. At VII.

HOMESTEAD SETTLERS

The allotment law, commonly known as the *Dawes bill*, has secured for its author the praise of

all interested in the welfare of the Indians. It has been accepted as the very best means of solving the Indian problem, and it is now, as has been pointed out in the earlier part of this report, receiving an administration, chiefly by written consent and agreement of the Indians, that promises to develop rapidly its benefits for allottees. At XXXV.

In a previous portion of this report it has been said that the allotment bill, commonly styled the *"Dawes bill,"* whereby, through the effect of allotments, citizenship is conferred upon the allottee, has had general recognition and approval. We should not now interfere with its principal provisions or defeat any of its beneficent effects. Its purpose is to change the Indians from the state of wardship to citizenship. This process has been going on for many years, and with increased force from year to year. There are no facts furnished upon which it can be asserted that the results of this policy are injurious to the Indians, or threatening to become so, while there is abundant evidence that severance of the tribal relations, the establishment of the Indian upon his own property, and the *opening of his great reservations* to white settlement have been conducive to the welfare of all concerned. At XXXVIII.

INDIAN CESSIONS AND INDIAN COMMISSIONS.

The public land transferred from uselessness to cultivation through treaties made between the Indians and the United States has been acquired by the effective agency of various commissions, some of which are still in the field. At XLII.

COLVILLE RESERVATION.

. . . in the state of Washington, to *negotiate* with the bands of Indians on the Colville Indian Reservation, in Washington, for the *cession* of such portion of the reservation as the Indians may be willing to dispose of, that the same may be opened to white settlement. At LI.

Some allotments are being made on the ceded portion of the great Sioux Reservation, . . . at LVII-LVIII.

9A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1892) (EMPHASIS ADDED).

Of course it is possible to continue the present reservation system and the exercise of guardianship over these people in the future as in the past for an indefinite period to come. The objections to this, however, are many and vital. The agency and reservation system has possibly accomplished some good in the past, and it has, at present, the possibility of benefit during the transition period, but certainly no wise man who understands the situation would venture even to suggest that the system should be made permanent. At 5.

The power of the agent in cases where land has been allotted — as, for instance among the Sissetons, the Yanktons, the Nez Perces, and elsewhere — is very limited indeed. Those under him are no longer his subjects, but citizens of the United States. He can not maintain an Indian police force or exercise any of the autocratic power to which he was accustomed when they were still merely wards of the nation. He is agent, therefore, in large part only in name, having the shadow of his office rather than its substance. To entirely discontinue the agency, however, and leave the people who have so long been accustomed to paternal guidance to their own resources would, in many cases, work great hardship. . . .

By placing the superintendent of the school in charge of affairs, transferring to him something of the duties that have devolved hitherto upon the agent, and constituting him their chief counselor, director, and leader, the Indians would be spared many of the evils that might result from too hasty an abolition of the agency system. At the same time there would be the doing away of the agency proper . . . at 9-10.

COMMISSIONS AND NEGOTIATIONS FOR REDUCTION OF RESERVATIONS.

Pyramid Lake Reservation, Nev. At 74.

Colville Reservation, Wash. — The agreement negotiated by this commission, to which reference was made in my last annual report, was transmitted to Congress at the beginning of the last session, accompanied by the draft of a bill to ratify the same, notwithstanding the fact that certain of the provisions of the agreement were somewhat unsatisfactory. . . .

In reporting upon the bill the Senate Committee on Indian Affairs (Senate Report 664, Fifty-second Congress, first session) took the ground that as this reservation was established by executive order, it could be restored without the consent of the Indians. . . .

Upon that ground Congress, instead of ratifying or rejecting the agreement, passed an act vacating and restoring to the public domain that portion of the reservation which the Indians had agreed to sell, the lands so vacated and restored to be opened to settlement and entry by proclamation of the President. The act provides that the net proceeds of the lands shall be set apart in the Treasury of the United States, subject to further appropriation by Congress for public use, but until so otherwise appropriated shall be subject to expenditure by the Secretary of the Interior in the building of schoolhouses, the maintenance of schools for the Indians, the payment of such part of the local taxation as may be properly applied to the lands allotted to such Indians, and in such other ways as he may deem proper for the promotion of education, civilization, and self-support among said Indians. The act became a law without the approval of the President. . . .

It is a matter of regret that this new position was not taken by Congress before the negotiations were authorized, instead of after the Indians had given their consent to the restoration of lands upon terms and conditions which have been wholly ignored in the act. The Indians were thus led to believe that their consent was necessary and that they could

dictate the terms, and may feel aggrieved because the negotiations have been repudiated and their rights denied. At 76.

Another reason for the increase of business is the *breaking up of reservations* and the allotment of lands. During the past three years *more than 24,000,000 acres of Indian lands* have been *restored to the public domain*, and the amount of office work involved in preparing instructions for commissions, examining their accounts, and reporting upon their labors, as well as in allotting lands, has been very great. At 136.

REPORT OF SISSETON AGENCY.

The Reservation and Indians. — The Sisseton and Wahpetons no longer hold their land in common, having taken allotments in severalty, and on April 15 of the present year *this reservation was thrown open for settlement under the homestead law*, . . . At 469.

9B. REPORT OF THE SECRETARY OF INTERIOR, H. EXEC. DOC. 52ND CONG., 2D SESS. VOL. 12 (1892-93) (EMPHASIS ADDED).

Large areas of land held in reserve for indian purposes have been restored to the public domain. Agreements negotiated with fourteen indian tribes have provided for restoration to the public domain of nearly 26,000,000 acres, and a great bulk of this vast property has already been opened to public settlement. Other agreements negotiated are pending in Congress, and when ratified will add 10,000,000 acres at least for the same purpose. . . .

As a part of the work of reduction of indian reservations, 9,000,000 acres of the lands formerly occupied by the great Sioux Nation of indians in North and South Dakota have been opened as public domain, . . .

The same process of reduction of indian reservations is in progress in other sections of the country, where large areas of land are yet reserved for Indian occupancy. At VII.

RESERVATIONS AND TRIBES BROKEN UP.

The reservation system and the continuance of tribal relations have been *broken* to such a degree that what remains of these obstacles to the Indian's progress is light and easily removed. *The reservations have been purchased and converted into settlements after due allotments to the Indians* in sufficient quantities to enable them each to have a farm, and this, with a constant suppression of the influence attempted to be exercised by chiefs or head men, has developed among these people a sense of the importance of the individual, an appreciation of his power to take care of himself and of the necessity that it should be exercised. At VIII.

One grand result of the purchases of indian lands has been the establishment of the territory of Oklahoma. . . .

There have been negotiated agreements with Indians for the purchase of at least 10,000,000 acres, to be added to this territory, the most recent being that of the Kiowas and the most important that for the Cherokee Strip. At IX.

Since the 4th of March, 1889, more than 24,000,000 acres of Indian lands, released by the Indians of their right of occupancy, have been restored to the public domain and opened to settlement, to become the homes of pioneer settlers. In addition, a number of agreements have been negotiated which, when ratified, will swell the total area to over 30,000,000 acres of land, heretofore reserved and uncultivated, made available for productive use. During the same time 12,273 allotments in severalty have been made to Indians and 7,248 patents have been issued and delivered to Indian allottees, and others are in course of preparation. . . .

The negotiations for relinquishment of portions of reservations and allotments of land have involved many delicate questions and a great amount of work by the department and the indian bureau. At XXXIII.

NEGOTIATIONS WITH THE INDIANS.

Important negotiations were conducted and in progress with Indian tribes during the past fiscal year, and others have been recently inaugurated under provisions of law providing therefor, which are briefly referred to as follows: . . .At XXXIX.

SHOSHONE INDIAN COMMISSION.

The Department has been for some time in possession of information to the effect that the indians occupying the Shoshone or Wind River Reservation, Wyo., desired to take their lands by allotment and dispose of a portion of their reservation to the United States. The whites looking to the development of that State were anxious that negotiations be opened with the indians for the surrender of a portion of their reservation. At XLII.

COLVILLE COMMISSION.

Mark A. Fullerton, of Colfax, Oregon; William H. H. Dufur, of Dufur, Oregon, and James F. Payne, of Alma, N. C., were appointed as commissioners to determine the correct location of the northern line of the Warm Springs Reservation in Oregon, and also to negotiate with the various bands of Indians occupying the Colville Reservation, Wash., for the surrender of such portion thereof as they might choose to dispose of. Both duties were discharged by the Commission, and an agreement was concluded with the Indians of the Colville Reservation whereby they ceded to the United States the northern half of their reservation, embracing about 1,500,000 acres, for a consideration of $1,500,000. The report of the commission, their proceedings, and the agreement negotiated, were submitted to Congress at the beginning of its last session, accompanied by a draft of a bill to ratify the same, although certain provisions of the agreement were somewhat unsatisfactory to the Department. That body, when the agreement came before it for consideration, took the ground that as that reservation had been established by Executive order, it could be restored to the public domain without the consent of the Indians, and passed an act vacating and restoring to the public domain that portion of the reservation which the Indians had agreed to cede, the same to be thrown open to settlement and entry by proclamation of the President. This act becomes a law without the approval of the President. . . .

The act provides that the net proceeds of the lands so restored shall be set apart in the Treasury of the United States for the time being, but subject to such future appropriation for public use as Congress may make, and that until so otherwise appropriated may be subject to expenditure by the Secretary of the Interior from time to time for certain specific purposes for their benefit, and in the promotion of education, civilization, and self-support among the said Indians. . . .

The action of Congress in relation to this reservation constitutes legislative declaration as to the status of Executive order reservations. It is to be regretted that this declaration was not made prior to the appointment of a commission to treat with the Indians occupying this reservation for a relinquishment of a portion of it, for by the fact that a commission was sent to negotiate with them the Indians were led to believe through the councils held by the Commission that they possessed title to the lands and ought to be consulted as to the disposal thereof. The fact that their supposed rights have been ignored and that a portion of their reservation has been vacated and restored without their consent may cause them to feel sorely aggrieved when the land shall be opened to settlement after the survey thereof. At XLV-XLVI.

10A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1893) (EMPHASIS ADDED).

COMMISSIONS AND NEGOTIATIONS FOR REDUCTION OF RESERVATIONS.

Shoshone Reservation, Wyoming. — Under the provisions of a clause contained in the Indian appropriation act approved March 3, 1891 (26 Stats.,

1010), the Secretary of the Interior appointed three commissioners to negotiate with the Indians of Shoshone or Wind River reservation in Wyoming for the surrender of a portion of their reserve. . . .

Pyramid Lake Reservation, Nevada. — As stated in office report for the year 1892, an agreement was negotiated October 17, 1891, with the Pah Ute Indians residing upon the Pyramid Lake Reservation in Nevada, for the surrender of the southern portion of the reservation embracing the town of Wadsworth. At 30.

Siletz Reservation, Oregon. — October 1, 1892, an agreement was concluded with the Indians of this reservation, whereby they ceded to the United States, for the sum of $100,000, all their claim, right, title, and interest in and to all the unallotted lands of the reservation, except five sections of timber land, the amount ceded being about 178,840 acres. . . .

Nez Perce Reservation, Idaho. — May 1, 1893, an agreement was concluded with the Nez Perces in Idaho, by which they ceded to the United States all their unallotted lands (except some 30,000 acres of timber) for the sum of $1,626,222 and certain other considerations. The agreement has not yet been submitted to you for transmittal to Congress. . . .

Yankton Reservation, S. Dak. — The report of the Yankton Commission, dated March 31, 1893, and filed in the Department May 27, 1893, submitted an agreement concluded with the Yankton Sioux Indians December 31, 1892, by which they ceded to the United States all their surplus lands, some 168,000 acres, for the sum of $600,000 plus $20 for each male adult of the tribe. At 32.

11A. ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1894) (EMPHASIS ADDED).

. . .but of recent years Congress has been in the habit of attaching to this act agreements with various Indian tribes and of ratifying them therein, instead of ratifying them in separate acts, as in former years. This adds to what is called an appropriation for the Indian service large sums which are really payments for lands purchased by the Government primarily for the benefit of its white citizens. At 2.

Siletz, Yankton, and Nez Perces. — The agreement concluded with the Siletz Indians in Oregon, October 1, 1892, that with the Yankton Sioux in South Dakota, concluded December 31, 1892, and that with the Nez Perces in Idaho, concluded May 1, 1893, referred to in my last annual report, were ratified by the act of Congress approved August 15, 1894 — the Indian appropriation act. Under these agreements *some 880,000 acres of land will be restored to the public domain for disposition as provided in said act. At 28.*

That agreement has not been ratified, but Senate bill No. 99, Fifty-third Congress, second session, now pending, provides for vacating and restoring to the *public domain* the entire Walker River Reservation, and also a portion of the Pyramid Lake Reservation, which portion embraces a larger extent of territory than that included in the agreement. At 26-27.

11B. REPORT OF THE SECRETARY OF THE INTERIOR H. EXEC. DOC., 53RD CONG., 3RD SESS. VOL. 14 (1894-95) (EMPHASIS ADDED).

There are two means chiefly relied upon — education and *allotments of land in severalty*. . . .

I do not question the advisability of allotting land to Indians in severalty, but I do most seriously question the propriety of this course before the Indians have progressed sufficiently to utilize the land when taken. The allotments should be made to the Indians in severalty for the good of the Indians, for the advancement of the Indians, not for the purpose of obtaining land connected with the Indian reservation to satisfy the insatiable desire of border men, who obtain it frequently, not for homes, but for speculation. . . .

I urge a treatment of Indian land based solely upon the purpose of realizing from it for its owners the highest possible value. What is best for the Indians — to keep their land or to sell it? If the

members of a tribe have reached a state sufficiently civilized to be able to progress still further by selling a portion of their land, then sales should be made; but the land should not be purchased from the Indians at the best bargain the United States can make. It should be sold for the Indians by the United States, the Department acting as a faithful trustee, and obtaining for the Indians every dollar the land will bring. At III-IV.

AGREEMENTS. — The agreements concluded in 1892 and 1893 with the Nez Perces, Yankton Sioux, Yuma, and Siletz Indians, were ratified by the last session of Congress, and will result in *restoring to the public domain some 921,000 acres of land.* At IX.

12A. REPORT OF THE SECRETARY OF THE INTERIOR, H. DOC. 54TH CONG., 1ST SESS. VOL. 14 (1895-96) (EMPHASIS ADDED).

The area of public lands undisposed of at the close of the fiscal year amounted to 599,083,495 acres. This aggregate does not include Ohio, Indiana, and Illinois, in which a few isolated tracts may remain. It is also exclusive of Alaska, containing approximately 370,000,000 acres, and military and *Indian reservations,* reservoir sites, and timber reserves, *which may in the future be added to the public domain.* At XVII.

13A. ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1896).

COMMISSIONS

Crow, Flathead, Northern Cheyenne, Fort Hall, Uintah, and Yakima. — The Indian appropriation act for the current fiscal year authorizes the appointment by the Secretary of the Interior of a commission to consist of three persons, not more than two of whom shall be of the same political party and not more than one of whom shall be resident of any one State, to negotiate with the following Indians, viz: The Crow and Flathead Indians in Montana for the cession of portions of their respective reservations; the Northern Cheyennes and Crows

for the removal of the Northern Cheyennes from their present reservation on the Rosebud River to the southern portion of the Crow Reservation; the Indians of the Fort Hall Reservation in Idaho, the Uintah Reservation in Utah, and the Yakima Reservation in Washington, for the surrender of any portions of their respective reservations, and for such modification of existing treaties with them as may be deemed desirable by the Indians and the Secretary of the Interior; any agreement thus negotiated to be subject to ratification by Congress. At 32.

13B. REPORT OF THE SECRETARY OF THE INTERIOR (1896) H. DOCS. 54TH CONG., 2D SESS. VOL. 12 (1896-97) (EMPHASIS ADDED).

The public domain, or public lands — the property of the nation, and subject to legislative control and disposition by Congress alone — is the area known as public lands acquired by treaty, capture, cession by States, conquest or other acquisition, and purchase. At VI.

It is also exclusive of military and *Indian reservations,* reservoir site and timber reservations, and tracts covered by selections, filings, railroad grants, and claims as yet unadjudicated, a part of which *may in the future be added to the public domain.* At VII.

COMMISSIONS.

The Crow and Flathead Indians in Montana for the *cession* of portions of their respective reservations; the Northern Cheyennes and Crows for the removal of the Northern Cheyennes from their present reservation on the Rosebud River to the southern portion of the Crow Reservation; the Indians of the Fort Hall Reservation in Idaho, the Uintah Reservation in Utah, and the Yakima Reservation in Washington, for the surrender of any portions of their respective reservations, and for such modification of existing treaties with them as may be deemed desirable by the Indians and the

Secretary of the Interior; any agreement thus negotiated to be subject to ratification by Congress. At XLVI-XLVII.

THE UNCOMPAHGRE INDIAN RESERVATION.

A commission was appointed to allot the lands, and was instructed to inform the Secretary of the Interior what portion of the Uncompahgre Reservation in Utah *was not required for allotment or was unfit for agricultural uses, in order that the same might be restored to the public domain and opened for sett'ement*. That commission was duly appointed, but had difficulty in finding sufficient agricultural lands within the reservation to make the allotments, and was totally unsuccessful in persuading the Uncompahgres to agree to pay $1.25 per acre for the same. At XLVIII.

If this Court deems agency constructions and interpretations of surplus land statutes enacted pursuant to the Dawes Act of 1887 significant, the Annual Reports of the Commissioner of Indian Affairs and Secretary of the Interior contemporaneous with the period in which the statutes were passed should be more than adequate in this respect. *See* Appendix II for an extensive compilation of similar materials.

Certainly such reports are a more reliable indicia of congressional intent in 1891 than a similar construction by either the agencies or Congress in the 1930's, 1940's or the 1970's. For if the whole arena of Indian Affairs has one salient characteristic since the turn of the century, that characteristic is one of inconsistency and policy reversals. One need only compare the termination attitudes of the early 1900's with the subsequent reservation legislation of the 1930's, and need not even refer to the termination policies of the 1950's, to aptly illustrate the point.

Therefore, in addition to the inherent deficiencies attributable to any later source when used to establish an earlier fact situation, the documents of Indian Affairs are

even more susceptible because of this fluctuation in policy. The customary "vantage point of time" becomes in this situation a serious disadvantage. This is the reason Respondent has taken the position that everything should be referred back to its own year; a position which was, in part, assumed by this Court in *Mattz* v. *Arnett*, 412 U.S. 481 (1973), and which Respondent would urge be carefully considered in the instant case.

III

THE CARTOGRAPHIC RECORD OF INDIAN RESERVATIONS CONCLUSIVELY ESTABLISHES THAT CONGRESS DID NOT ALTER THE FUNDAMENTAL PRECEPT OF CESSION AGREEMENTS BY SIMPLY TAILORING THE AGREEMENTS TO THE DAWES ACT OF 1887: THE LAKE TRAVERSE RESERVATION WAS UNEQUIVOCALLY REMOVED THEREFROM.

Petitioner has termed the cartographic record as "not entirely clear" and has concluded that the unequivocal removal of the large orange triangle representing the Lake Traverse Reservation in 1891 on the official Map of the Office of Indian Affairs from the same map in 1892 was "insignificant". B.P., N. 31 at 43, 44. At 10, *supra*, the statement was made that an examination of the official Maps of the Office of Indian Affairs showing the Indian Reservations within the United States appended each year to the Annual Report of the Commissioner of Indian Affairs graphically accentuates the argument of Respondent in the instant case. The following summary analysis of the cartographic record is intended to conclusively support that statement.

Each year during the period in question, a map was compiled under the direction of the Commissioner of Indian Affairs showing the Indian Reservations within the limits of the United States as solid orange configurations superimposed upon an outline of the United States. When a treaty or cession disestablished a reservation or a portion thereof and the

reservation was subsequently opened to settlement, the same orange configuration was consistently removed therefrom. For example, *see* the treatment accorded the Great Sioux Reservation in 1888 and 1889. Prior to the ratification of the agreement in the instant case, the Lake Traverse Reservation was represented thereon as a large orange triangle in the northeastern corner of what was then Dakota Territory. This same large orange triangle was immediately and unequivocally removed from the map after the ratification and subsequent opening of the Lake Traverse Reservation in 1892. The published Indian Reservation Maps of the General Land Office, as well as other miscellaneous maps on file in the Cartographic Archives Division of the National Archives, Washington, D.C., similarly depict this removal of the Lake Traverse Reservation, as well as other ceded reservations or portions thereof.

Sixteen years later, with a change in administration, the new Commissioner of Indian Affairs initiated a new map of Indian Reservations throughout the United States with orange lines encompassing some of the white areas of what had theretofore been reservations but had within the past twenty years been previously ceded and thrown open to settlement. What had been Lake Traverse Reservation, as well as many other ceded reservations such as those encompassing the southwestern one-fourth of Oklahoma, were depicted in this manner and referred to in the legend as an "opened" reservation. The reservations that had never been ceded and thrown open to settlement continued to be represented by the same orange configurations.

In 1918 the map changed again and the same white areas encompassed by colored lines are shaded in and denoted in the legend as "former reservations." The reservations that had never been ceded and thrown open to settlement were still represented by the original orange configuration of earlier years.

With respect to the issue in the instant case, neither the 1908 colored line nor the "former" designations on the maps beginning in 1918, are really probative of the interpretation actually accorded the 1891 Act by those primarily responsible for its administration. As was the case with the documents of Indian Affairs in general, Respondent would submit that only the contemporary construction, within a reasonable period of the passage of the act, is persuasive in this respect. Certainly the first sixteen years of a continuous and unequivocal treatment of disestablishment should qualify as both reasonable and persuasive, especially in light of the additional years previous to 1892 wherein reservations which were similarly ceded and thrown open to settlement were similarly removed from these same maps. The date of the 1971 map cited by Petitioner speaks for itself in this respect. B.P., N.31 at 43-44.

In reference to the Indian Reservation Maps in general, the one important point that must be noted is that the removal of the reservation ordinarily corresponded with the year of the *opening* rather than the ratification or the passage of the act. Respondent has submitted that this practice was because of an administrative convenience, discussed *infra*, in connection with the preposition arguments of Petitioner. In this respect, the importance of similar maps in *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), was negligible as neither the North Half nor the South Half of the Colville Reservation were "opened" until a considerable number of years after the passage of the acts therein. Hence, even the North Half of the Colville Reservation appears intact on these same maps for some years after the passage of the 1892 Act which vacated and restored it to the public domain. With respect to the issue in *Mattz* v. *Arnett*, 412 U.S. 481 (1973), the cartographic record, as noted in the Briefs to this Court by the parties therein, was similarly of negligible importance, but for two altogether different reasons: The complex prior history of the area, in addition to the Executive Order of 1891, and the inherent difficulties presented by the size of the

reservation in question. The result of which was a cartographic record of some support to both petitioner and respondent's position. B.P. at 24-26, B. R. 22-24, P.R.B. 21-23 and R.S.B. 3-5, *Mattz, supra.*

None of the difficulties presented by the cartographic record of the acts construed in *Seymour* and *Mattz* are present in the instant case. The Lake Traverse Reservation was immediately and unequivocally removed from the official maps in the same manner as the other earlier cessions that disestablished reservations or portions thereof, as well as the contemporaneous cessions ratified by the same Congress, on the same day, in the same bill as the Sisseton-Wahpeton Agreement. In this light, the effect of the 1891 Act on the status of the Lake Traverse Reservation present in the legislative history and surrounding circumstances, *supra*, is once again confirmed by yet another probative source of disestablishment. The discussion of this same effect on the face of the Act, *infra*, should serve to conclusively establish this to be the *only* construction of the 1891 Act consonant with the intent of Congress in 1891.

IV

THE CURRENT STATUS OF THE LAKE TRAVERSE RESERVATION SHOULD BE DETERMINED BY PLACING BOTH THE LANGAUGE AND THE LEGISLATIVE HISTORY OF THE ACT OF MARCH 3, 1891, IN A PROPER HISTORICAL PERSPECTIVE.

The Brief for Petitioner is illustrative of the sophisticated nature of the arguments which have been presented to many of the lower courts resolving issues similar to the one presented herein: In the main, sovereignty and unfounded emotionalism are coupled with a plea for an almost blind adherence to recent precedent which is pounded throughout and buttressed by blatant policy arguments and presumptions of statutory construction in favor of Indian Tribes. The result is, of course, a well researched and, at first glance, a well documented argument supporting the strong generalizations therein that a *certain* reservation was not diminished or disestablished and that a *certain* argument compels the court to reach a similar conclusion. However, no degree of sophistication can weather an exposure to the contemporary documents of the period and still make persuasive an argument that does not accurately reflect the evidence of congressional intent found therein. The Brief for Petitioner in the instant case is not an exception.

A. THE LEGISLATIVE HISTORY OF THE ACT OF MARCH 3, 1891, DOES NOT SUPPORT THE POSITION THAT THE LAKE TRAVERSE RESERVATION WAS TO CONTINUE TO EXIST AS SUCH.

Respondent notes and deems significant that *in only three instances* in Petitioner's entire brief was an attempt made to actually substantiate its arguments by quotations from a portion of the *Congressional Record* or Senate and House Reports. B.P. at 18, 19, 20. In all three, the quotations are of such a general nature that they cannot fairly be said to be probative of anything.

The first is merely a description by Mr. Diggs (not General Whittlesey) of the rapid settlement and civilization, as well as other advantages, that would follow the ratification of the agreement and subsequent opening of the reservation. How such a "discussion leading to the 1889 agreement *compels rejection* of any suggestion that the proposed law would disestablish the reservation" is certainly not apparent from the text of the Brief for Petitioner. B.P. at 18 (emphasis added).

The second, a remark by Congressman Gifford to the effect that the tribes that felt the influence of civilization in their vicinity were becoming civilized and self-supporting, is similarly totally without any probative value whatsoever, even if it was concerned with the Sisseton-Wahpetons, which it was not. B.P. at 19.

The third relates back to the reason for establishing the reservation and the "loyal scout claim" and in no way whatsoever is it even related to the issue of whether or not Congress intended to disestablish the Lake Traverse Reservation.

The concluding paragraph of this section typically contains citations to *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), and *Mattz* v. *Arnett*, 412 U.S. 481 (1973), which, in conjunction with the three isolated quotations, are said to conclusively support the assertion that "the purpose, surrounding circumstances and legislative history of the 1891 Act are inconsistent with an intent to disestablish or diminish the reservation." B.P. at 17. If the argument of Petitioner is a true reflection of the congressional intent expressed by the Act of 1891, somewhere in the voluminous legislative history of the 1891 Act this concept should appear in a form substantiating that position. Certainly Petitioner would have set forth such an enlightening passage at length and would not, therefore, have been forced to quote three pasages which are probative of nothing and then fall back on *Seymour* and *Mattz* as support for the proposition that the "purpose, surrounding circumstances and legislative history" of the 1891 *Sisseton-Wahpeton* Act are inconsistent with a congressional intent to disestablish the *Sisseton-Wahpeton* Reservation. B.P. at 17.

In light of the established rule of Indian Law that separate treaties with separate tribes must be separately contrued, the argument of Petitioner becomes even more untenable. Respondent would submit that this request for an almost blind adherence to precedent is founded upon the fact that the purpose, surrounding circumstances and legislative history of the Sisseton-Wahpeton material clearly evidences an intent by Congress to restore the unallotted land to the public domain and thereby disestablish the Lake Traverse Reservation. *See* Parts I, II, III, *supra*.

B. THE LANGUAGE OF THE ACT OF MARCH 3, 1891, DOES NOT SUPPORT THE POSITION THAT THE LAKE TRAVERSE RESERVATION WAS TO CONTINUE TO EXIST AS SUCH.

Under the subheading, "language of the 1891 Act *rejects* disestablishment," the main thrust of all Petitioner's arguments has been directed toward an attempt to persuade this Court that the operative language of the 1891 Act was not intended by Congress to restore the unallotted land to the public domain and thereby disestablish the Lake Traverse Reservation. B.P. at 21.

Hedging from the beginning, the arguments commence with calling this Court's attention to Petitioner's general rule that if ambiguities arise in the course of discussion, statutes passed for the benefit of dependant Indian tribes must be resolved in favor of the Indians. B.P. at 21. At the end, Petitioner concludes with "[a]t worst, the language is ambinguous, *necessitating* construction in favor of the Indians." B.P. at 33 (emphasis added). Respondent would agree with Petitioner's initial statement that the language of the 1891 Act probably doesn't require invocation of Petitioner's general rule but for altogether different reasons, none of which, even "at worst," necessitate a construction in favor of the position of Petitioner. Rather than "reject disestablishment," the plain language of the 1891 Act, viewed either from a proper historical perspective or in light of the purpose, surrounding circumstances and legislative history of the Sisseton-Wahpeton Agreement, would seem to compel the conclusion that the unallotted land was restored to the public domain and the Lake Traverse Reservation was thereby disestablished.

1. The Operative Language of the 1891 Act Disestablished the Lake Traverse Reservation.

Section 26 of the 1891 Act sets forth the clear and unambiguous operative language of the Sisseton-Wahpeton cession agreement in the following manner:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby *cede, sell, relinquish,* and *convey* to the United States *all their claim, right, title,* and *interest in* and *to all* the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made. Act of March 3, 1891, 26 Stat. 1035, 1036 (emphasis added).

Petitioner has termed "untenable" a conclusion that such language was intended by Congress to disestablish the Lake Traverse Reservation as such or separate any tracts therefrom. B.P. at 15. Respondent would respectfully submit that, when viewed in a *proper historical perspective,* the operative language of the 1891 Act was intended by Congress to disestablish the Lake Traverse Reservation in precisely the same manner as other reservations disestablished by Congress in the 80 years prior to the 1891 Act by cession language identical in all material respects. Indeed, even the prior cession agreements of the Sisseton-Wahpetons aptly illustrate this precise point.

In 1897 the Secretary of the Interior was requested by Congress to compile a report containing:
"... copies of all treaties or agreements made with the Sisseton and Wahpeton bands of Dakota of Sioux Indians prior to and since eighteen hundred and sixty-three... ." Act of June 7, 1897, 30 Stat. 89 (1897).

In his report, S. Doc. No. 68, 55th Cong., 2nd Sess. (1898), submitted to Congress on January 17, 1898, the Secretary of the Interior included the text of each and every treaty or cession agreement, including the 1891 Act. S. Doc. No. 68, 55th Cong., 2nd Sess. 22-58 (1898).

An examination of the operative language of the documents therein reveals that, since 1830, cession language in all material respects identical to the operative language of the 1891 Act had been utilized by the Government of the United States, via cession agreements or treaties, to extinguish the claim or title of the members of the Sisseton-Wahpeton bands to areas now encompassed by Minnesota and Iowa, as well as other vast tracts of territory. For example:

> 1. *The said Tribes cede and relinquish to the United States forever all their right and title to the lands lying within the following boundaries,* ... Treaty of 1831 contained in Report of the Secretary of the Interior, S. Doc. No. 68, 55th Cong., 2nd Sess. 22 (1898) (emphasis added).
>
> 2. ... *Wah-peton and Sisseton Bands of the Sioux cede and relinquish to the United States forever, a Tract of Country* .... Treaty of 1831 contained in Report of the Secretary of the Interior, S.Doc. No. 68, 55th Cong., 2d Sess. 23 (1898) (emphasis added).
>
> 3. ... *forever cede, relinquish and quit claim to the United States all our right, title and interest of whatsoever nature in, and to, the lands lying between the State of Missouri, and the Missouri River,* ... Treaty of 1836 contained in Report of the Secretary of the Interior, S. Doc. No. 68, 55th Cong., 2d Sess. 30 (1898) (emphasis added).
>
> 4. ...*cede, sell, and relinquish to the United States, all their lands in the State of Iowa; and, also, all their lands in the Territory of Minnesota,* ... Treaty of 1851 contained in Report of the Secretary of the Interior, S. Doc. No. 68, 55th Cong., 2d Sess. 31 (1898) (emphasis added).
>
> 5. *The said bands hereby cede to the United States the right to construct wagon roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the government may require, over and across the lands claimed by said*

bands (including their reservation as hereinafter designated) . . . Treaty of 1867 contained in Report of the Secretary of the Interior, S. Doc. No. 68, 55th Cong., 2d Sess. 42 (1898) (emphasis added).

6. *To cede, sell, and relinquish to the United States all their right, title, and interest in and to all lands and territory . . . as well as all lands in the Territory of Dakota to which they have title or interest,* . . . Treaty of 1872 contained in Report of the Secretary of the Interior, S. Doc. No. 68, 55th Cong., 2d Sess. 48 (1898) (emphasis added).

7. . . . *To cede, sell, and relinquish to the United States all their right, title, and interest in and to all lands and territory,* . . . *as well as all lands in the Territory of Dakota to which they have title or interest,* . . . Treaty of 1867 contained in Report of the Secretary of the Interior, S. Doc. No. 68, 55th Cong., 2d Sess. 52 (1898) (emphasis added).

8. *The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.* Act of March 3, 1891, c. 543, 26 Stat. 1032, 1036.

The transactions were variously referred to throughout the remainder of the Articles as cessions, cessions and relinquishments, cession or relinquishment, territory proposed to be ceded, country thereby ceded, lands ceded, Indian title thereby to be entirely extinguished, foregoing cessions and negotiations, *ad infinitum*.

In a prefatory synopsis, the Secretary of the Interior describes the substance of each cession. For example, the substance of the Treaty of June 19, 1858, 12 Stat. 1037, is described as follows:

TREATY OF JUNE 19, 1858. (12 Stat., 1037)
By article 2 of this treaty a part of the lands described in the original third article of the treaty of 1851, which were subsequently confirmed to the Indians by the act of July 31, 1854, as a *permanent* reservation, *were ceded to the United States,* . . . Report of the Secretary of the Interior, S. Doc. No. 68, 55th Cong., 2d Sess. 5 (1898) (emphasis added).

The substance of the 1891 Act is similarly described:

AGREEMENT OF DECEMBER 12, 1889.
(Ratified by act of Congress approved March 3, 1891, 26 Stat., 1035.)

By this agreement the Sissetons and Wahpetons *ceded all the unallotted lands of their reservation (Lake Traverse) in North and South Dakota,* to be paid for by the United States, at the rate of $2.50 per acre.[14] Report of the Secretary of the Interior, S. Doc. No. 68, 55th Cong., 2d Sess. 8 (1898) (emphasis added).

Nothing in the entire report can fairly be said to support the position of Petitioner that the operative language of the 1891 Act was in substance any different from the cessions of the 1830's, 1850's or the 1860's. In this respect, the attempt of Petitioner to distinguish between the "unequivocal language" of an "absolute cession," ("forever and absolutely") and the operative cession language of the 1891 Act is without merit. B.P. at 24, 14. Similarly, the substance of the operative language of the earlier cession agreements or

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14. In a letter to Senator Thurston, Chairman of the Senate Committee on Indian Affairs, the Secretary of the Interior again failed to note any distinction in this respect between the cession agreements:

> The document numbered 68 shows that $7,146,629.80 were paid to and expended for the Sisseton and Wahpeton bands in the same period, under all treaties with them or acts of Congress for their benefit, being an excess of $1,034,971.92, over all treaty or legal obligation or requirements, including the value of *lands ceded by the treaties or agreement of 1867, 1872 and 1889*, and an excess of $4,425,197.44 over the value or amount of forfeited annuities. Letter from E. A. Hitchcock, Secretary of the Interior to Sen. John M. Thurston, Chairman, Committee on Indian Affairs, March 10, 1900 (emphasis added).

treaties also disposes of the assertion by Petitioner that "the failure to use such unequivocal language in the Lake Traverse provisions *can only* be regarded as an intent *not* to disestablish or diminish the reservation." B.P. at 24 (emphasis added).

Historically, cession language identical in all material respects to the language of the 1891 Act has ordinarily been understood by jurors generally to designate the transfer of territory from one government to another. *Worcester* v. *Georgia*, 31 U.S. 515 (1832); *Cherokee Nation* v. *Georgia*, 30 U.S. 1 (1831); *Strother* v. *Lucas*, 37 U.S. 410 (1838). When one nation cedes territory to another, it generally hands over the title in sovereignty good against all the world. *Goetz* v. *United States*, 103 F. 72 (1900). In fact, prior to the decision of the court below, four separate courts have similarly construed the operative language of the 1891 Sisseton Act to have disestablished the Sisseton-Wahpeton Reservation. *See* the discussion of the *DeMarrias* decisions, infra at 159-164, citing the operative langauge as an "explicit manifestation" of disestablishment. As recently as 1965, the Tenth Circuit Court of Appeals concurred in the analysis of the *DeMarrias* decisions. *Ellis v. Page*, 351 F. 2d 250 (1965).

> The Comanche, Kiowa and Apache Treaty in Tooisgah and the Cheyenne and Arapahoe Treaty involved here were negotiated treaties or agreements between the government and the Indian tribes by which in consideration of the payment of money and allotments in severalty the tribes did 'cede, convey, transfer, relinquish and surrender, forever and absolutely, without any reservation', all their claim in and to the lands embraced within the designated reservation. While the words of alienation employed in the treaties do not formally disestablish the reservations, we think they have the unequivocal effect of doing so. *In treaty parlance they are as appropriate to disestablish the reservations as the Congressional words 'vacate and restore' employed in the 1892 Act to disestablish a portion of the Colville reservation.* *Ellis, supra* at 252 (emphasis added).

In general, the import of the definition of cede in the three major law dictionaries is similarly consonant with this construction:

Black's Law Dictionary, Third Ed. (1933).

> CEDE - To yield up; to assign; to grant. *Generally used to designate the transfer of territory from one government to another.* (emphasis added).

Ballentines Law Dictionary, 3rd Edition, Edited by William S. Anderson (1969).

> CEDE - The precise meaning of the word depends somewhat on the subject matter with which it is connected. In some instances, it is used in the sense of 'grant', but ordinarily it means to yield, to surrender, to give up. Thus a person grants, conveys, or deeds land, *whereas a nation transfers territory by 'ceding it.'* (emphasis added).

Bouvier's Law Dictionary, Baldwin's Century Edition (1934).

> CEDE - To assign; to transfer. *Applied to the act by which one state or nation transfers territory to another.* (emphasis added).

With respect to the portion of *Worcester* v. *Georgia*, 31 U.S. 515 (1832), cited by Petitioner, Respondent does not agree that Chief Justice Marshall was therein "considering" the legal effect of "cession" language. B.P. at 55. Rather, Respondent would argue that Chief Justice Marshall was referring to

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15. *Tooisgah v. United States*, 186 F.2d 93 (CA 10 1950), the earlier decision to which the Tenth Circuit refers, also held that the reservation therein was similarly disestablished by a *cession* agreement identical in all material respects to the Sisseton-Wahpeton Agreement in the instant case.

the ambiguous phrase " 'managing all their affairs' " at the beginning of the paragraph. *Worcester* v. *Georgia*, *supra* at 553. In any event, such a discussion would not be controlling as to the manner in which the members of the Sisseton-Wahpeton Tribe understood the transaction in the instant case. An examination of the council transcripts of the 1889 negotiations, *supra*, establishes that the members of the Sisseton-Wahpeton Tribe understood the precise nature of the proceedings even down to the finest details on interest alternatives. Throughout the entire transcripts, although the terminology varies, references were made to earlier cessions by treaty and the effects thereof, as well as to the recently concluded negotiations for the cession of a portion of the Great Sioux Reservation.

As far as the effect attributed to the cession terminology by Congress is concerned, the record is clear and unambiguous, as evidenced by the material set forth in Part I, *supra*. Similarly, the action, as well as the effect of the other agreements ratified in the Act of March 3, 1891, support this conclusion. Nor is there any doubt as to the agency construction thereof. The Annual Reports in general and specifically attributed this same effect to the ratification of the agreement. Part II, *supra*. On its face the Act of March 3, 1891, disestablished the Lake Traverse Reservation. The "subject to the laws of the State" terminology, discussed *infra*, adds additional support to this construction.

2. The "Subject to the Laws of the State Wherein Located" Language of the 1891 Act Supports the Position of Respondent that the Act was Intended by Congress to Disestablish the Lake Traverse Reservation.

Section 30 of the 1891 Act places the "subject to the laws of the state wherein located" portion of the 1891 Sisseton-Wahpeton Act in the following context:

> SEC. 30. That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located: *Provided*, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same. Act of March 3, 1891, 26 Stat. 1035, 1039.

In this instance Petitioner has not only termed "untenable" any argument that such language supports a conclusion that the 1891 Act was intended by Congress to disestablish the Lake Traverse Reservation, but also has further asserted that "the only intelligible meaning of Section 30's state law clause is that it modified the *only* immediately preceding clause." B.P. at 15, N. 22 at 32 (emphasis added).

The Eighth Circuit Court of Appeals in *United States ex rel. Feather* v. *Erickson*, 489 F.2d 99 (CA8 1973), rejected the argument of Respondent that Section 30 conferred state jurisdiction upon the entire portion of the ceded lands and termed the conclusion of Petitioner "more plausible." *United States ex rel. Feather*, *supra* at 101. In this respect, the court not only departed from the position it deemed praiseworthy in 1963, but also reached a conclusion contrary to that of the four *DeMarrias* decisions discussed *supra* and *infra*. Since the

South Dakota Supreme Court in the instant case construed the phrase consonant with, and specifically cited this aspect of the *DeMarrias* decisions with approval, Respondent elected to seek, from two independant sources, professional opinions on the grammatical construction and meaning of this portion of Section 30 of the Act of March 3, 1891.

For the first opinion, Respondent addressed a letter to the English Department of the University of South Dakota, Vermillion, South Dakota, and requested an interpretation of the meaning and intent of Congress in regard to the aforementioned language contained in Section 30 of the 1891 Act, postulating two possible interpretations:

> 1. The lands shall be subject only to entry and settlement under the homestead and townsite laws of the United States and be subject to the laws of the state wherein located; or
>
> 2. The sixteenth and thirty-sixth sections of said lands shall be reserved for common school purposes and be subject to the laws of the state wherein located.

Seven members of the English Department responded in a detailed analysis of parallel structure, word order and punctuation set forth at Appendix I, 31-34. The majority, based upon their observations and analyses, "supported the conclusion that the writer's intent was to allow the first 'shall' to control the final phrase, with the resultant interpretation that all of the lands, not just those sections reserved for school purposes, are to be subject to state law." Appendix I, 33.

For the second opinion Respondent requested Marion R. Smyser, a Professor of Law, who has for several years instructed Legislation and similar courses at the School of Law of the University of South Dakota, Vermillion, South Dakota, to construe the language contained in this portion of Section 30. In Professor Smyser's opinion:

> Such comma would have been unnecessary and certainly improper if the framers of the questioned language had intended to confine the phrase 'and be subject to the laws of the State wherein located' to the lands referred to in lines 9 and 10. The fact that the framers saw fit to utilize the comma after the word purposes in line 12 clearly indicates that they purposely separated the said phrase from the subject immediately preceeding it . . . .

The complete text of this response is set forth at Appendix I, 38-39.

In addition to the above opinions, when one considers the cession terminology and the repeated references to the public domain discussed in Part I, the argument of Petitioner that Congress intended only the school lands to be subject to the laws of the State becomes even less persuasive.

The Eighth Circuit Court of Appeals accepted as "more plausible" a third argument that the comma should not have been there at all. *United States ex rel. Feather, supra* at 101. Although Petitioner has apparently declined to advance the "misplaced comma" argument, in itself somewhat of a misnomer for a comma that should not have been there at all, standard rules of statutory construction would seem to preclude such an interpretation. At least, this would be the rule in the absence of persuasive evidence to the contrary, and in this respect the *Feather* opinion will not suffice.

3. A Congressional Determination to Disestablish: The Public Domain.

If any one principle permeates Federal Indian Law with respect to the issue in the instant case, that principle is the irreconcilable inconsistency which exists between Indian reservation boundaries and the public domain. For over one hundred years Congress had been restoring reservations or portions thereof to the public domain and that restoration necessarily disestablished the boundaries of reservations.

This principle is the foundation upon which *Seymour*, *Mattz* and all of the recent decisions are based. As Petitioner has succinctly stated "Public domain land is not Indian Country." B.P. at 47. Throughout the entire Brief of Petitioner, particularly in the section concerned with the language of the 1891 Act, this Court's attention is directed to the fact that, on its face, the 1891 Act does not "specifically" contain the public domain terminology; from this position it is therefore argued that "no portion of it was restored to the public domain." B.P. at 23, 24. Although Petitioner is correct in stating that the 1891 Act on its face did not specifically refer to "public domain," the conclusions drawn therefrom are clearly erroneous. In light of this fact and because of the importance of this concept of "public domain" as one indication by which to conclusively establish the effect of a certain act on a certain reservation, a somewhat detailed analysis of the concept and precepts of the public domain terminology is necessary at this point.

In the first instance, but for the fact that several cession agreements were all presented to the House and the Senate at the same time, and some of the phraseology had to be altered by Senator Dawes to somewhat structure the entire 1891 Act, the Sisseton-Wahpeton portion thereof might well have contained the "public domain" terminology that Petitioner deems so important. In addition, Respondent has already established that the Crow agreement passed by the same Congress, on the same day, in the same bill as the Sisseton-Wahpeton Agreement was *similarly defective* in this respect; no one could question the fact that it effectively disestablished a portion of the Crow Reservation by restoring it to the public domain. An examination of many of the other cession agreements from the 1860's on, can also be found to be similarly defective, although such agreements undeniably disestablished reservations once encompassing nearly half of the territory of the midwestern and northwestern states. All of which leads one back to the origin of the general statements in some of the recent decisions, and explicitly set

forth in *Mattz* v. *Arnett*, 412 U.S. 481 (1973), that Congress has used clear language on the face of the act in legislation that disestablished reservations or portions thereof, such as "vacated and restored to the public domain" terminology: The statute which vacated and restored to the public domain the unallotted portion of the North Half of the Colville Reservation, 27 Stat. 63 (1892).

At the time this Court decided *Seymour* v. *Superintendent*, 363 U.S. 351 (1962), the 1892 Colville Act was, of course, the most logical standard with which to compare the 1906 Colville Act. After all, the 1892 Act had accomplished the very result that the respondent had asked this Court to attribute to the 1906 Colville Act. Similarly, when an analogous issue was presented in *Mattz*, the 1892 Colville Act was again a most logical reference with which to compare the 1892 Klamath River Act. Unfortunately, what seemed the most logical and natural choice of a standard was, in actuality, just about the most *atypical* statute in terms of reservation openings that had been enacted since 1887. Exactly what happened and the reasons for the rather unusual procedure and specific wording of the 1892 Colville Act, was succinctly condensed in the 1892 Annual Reports of the Commissioner of Indian Affairs and Secretary of Interior, 103-104, 106-107, *supra*. For purposes here, it should suffice to state that but for the refusal of Congress to recognize the title of the residents of the Colville Reservation by failing to ratify an already concluded cession agreement, in all material respects procedurally and textually identical to the Sisseton-Wahpeton agreement, the 1892 Colville Act would have been a mirror image of the 1891 Sisseton-Wahpeton Act. The "vacate and restore to the public domain" terminology utilized by Congress to *unilaterally* disestablish a portion of the Colville Reservation would have, in all probability, never appeared on the face of the 1892 Colville Act. Nevertheless, the North Half of the Colville Reservation would have been just as effectively restored to the public domain.

While this Court merely listed the "vacate and restore to the public domain" terminology as an example of clear language of disestablishment in the *Mattz* opinion, others have taken a more distorted position similar to that of Petitioner: "When Congress disestablishes or diminishes reservations" the unallotted portions thereof are "*specifically* restored to the public domain" on the face of the act. B.P. at 23-24 (emphasis added). The result of which has led some courts to treat the "public domain" terminology as words of art without which reservations could not have been disestablished unless such phraseology appeared on the face of the act. Consequently, other indicia equally probative of the intent of Congress, such as the "cede and relinquish" terminology discussed *supra*, have been painfully neglected in the recent opinions.

In any event, the Sisseton-Wahpeton materials clearly surpass the full statement of the standard set forth in *Mattz* that a congressional determination to disestablish "be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz*, *supra* at 505. As far as the legislative history and surrounding circumstances are concerned, the material set forth in Part I not only specifically attributes this same "public domain" effect to the 1891 Act, but it also contains other analogous references that can only be construed as a congressional determination to disestablish the Lake Traverse Reservation. *See* Part II, III. As far as the face of the 1891 Act is concerned, the "cede and relinquish" terminology, *supra*, should of itself be determinative of the issue, especially in light of other sections such as the "subject to the laws of the state" section discussed *supra* and the school land grant discussed, *infra*.

4. The School Land Grant of the 1891 Act Supports the Position of Respondent that the Act was Intended by Congress to Disestablish the Lake Traverse Reservation.

An integral part of the attempt to avoid the plain wording on the face of the 1891 Act, which states that the land so

affected shall be subject to the jurisdiction of the State of South Dakota, is involved in the treatment accorded the school land grant by Petitioner. B.P. at 27-28, 30, 31, 32, 33. A detailed examination of the form and substance of this argument reveals, and is in general, illustrative of the irreconcilable inconsistencies inherent in the position of Petitioner: That the 1891 Act did not restore the unallotted land to the public domain and thereby disestablish the Lake Traverse Reservation.

Initially, the argument is prefaced with Petitioner's general ambiguity rule mandating this Court to construe the laws most favorably in accordance with the arguments of Petitioner. B.P. at 27-28. From this point, the statement is made that "Section 30 only makes the land reserved for schools subject to state laws" and that such jurisdiction is only "proprietary in scope." B.P. at 30. In the first instance, for an Act of Congress to make an explicit grant of jurisdiction to the state of only two sections per township would seem rather anomolous in light of Petitioner's argument that those sections would still be within the boundaries of a reservation.

The argument proceeds with a reiteration "that the 'subject to the laws of the State' clause in Section 30 had application to land sections 16 and 36 only," (B.P. at 31) which is then footnoted to a statement that " 'subject to the laws of the State' should not necessarily be construed as equivalent to 'subject to the jurisdiction of the State.' " B.P. N. 21, at 31. From here the whole argument further deteriorates with a statement that "section 30 can be plausibly interpreted as continuing tribal jurisdiction over the land sections 16 and 36, although the tribe is enjoined to apply the laws of the State," with a citation to support such a "construction" that ostensibly this Court had previously held, in an analogous situation, that the federal courts "had jurisdiction over crimes committed by Indians on section 16, within the reservation but ceded to the state for school purposes" in *United States* v. *Thomas*, 151 U.S. 577, 585 (1894). B.P. N. 21, at 31

Apart from the fact that in *Thomas, supra*, the grant had been made *prior* to the establishment of the reservation and by no stretch of the imagination would the fact situation therein square with the proposition for which it is cited by Petitioner, this whole argument would seem to Respondent to be most tenuous, even without the further assertion that:

> Section 30 of the 1891 Act does not grant land sections 16 and 36 to South [D]akota nore [sic] does it provide for the purchase of these land sections by the State. It merely *reserves* these land sections for common school purposes and makes them subject to the laws of the State. B.P. N. 21, at 31 (emphasis as in original).

Irrespective of how this Court ultimately resolves the "subject to the laws of the State" comma issue, *supra*, the one thing that is very clear with respect to the school land grant, is that the argument of Petitioner that the 1891 Act "does not *grant*" nor "provide for the *purchase* of these land sections" but "merely *reserves* these land sections for common school purposes," is *patently* erroneous because it is in conflict with another *express* provision of the 1891 Act. B.P. N. 21, at 31. Respondent is referring to Section 38 which applies to *all* of the school land "grants" of the separate agreements incorporated into and ratified by the 1891 Act, wherein it is succinctly stated that:

> SEC. 38. No provision for settlement on or sale of the lands in the *various agreements hereinbefore mentioned* shall apply to sections sixteen and thirty six thereon, which land in the States are hereby *granted* to the State in which they are situated, for the support of the common schools of such State under the limitations prescribed by law, and such sections in the Territories of the United States are reserved from occupancy, entry, or sale, under any land law of the United States; but this provision shall not apply to mineral land which may be disposed of under the laws applicable thereto. Act of March 3, 1891, § 38, 26 Stat. 1044 (1891) (emphasis added).

But for the importance of such a grant, to be hereinafter set forth in detail, Respondent would not have dwelt upon the confusing nature of the argument of Petitioner in this instance. However, when the school land section is examined in light of the *condition precedent* to such a grant, as set forth in the South Dakota Enabling Act, the reason for the rather special treatment hereby accorded this provision will become apparent.

As far as Respondent has been able to determine, Petitioner's statement that the 1889 Agreement did not contain the language of the school land grant is totally correct. Nor did our search of the Sisseton-Wahpeton legislative history reveal an explanation that Petitioner was unable to locate, other than the reference cited by Petitioner, which in no way clarifies the necessity for such a grant in a cession agreement. However, an examination of the legislative history of another analogous and, in all material respects, *identical* cession agreement concluded with the members of the Rosebud Sioux Tribe for a cession of a portion of the Rosebud Reservation, is most definitely informative and sheds considerable light on the very issue presented in the instant case.

In essence, the legislative history of the Rosebud cession reveals that a provision in the Enabling Act, admitting the State of South Dakota into the Union, was worded in such a manner that the disestablishment of a reservation and its restoration to the public domain by Congress operated as a *condition precedent* to any grant of school land to the state from areas then *within* the boundaries of a reservation. In other words, such a grant would not become operative *until* the reservation or a portion thereof was disestablished and restored to the public domain by Congress.

Although the other legislative histories of similar cessions or "openings" in South Dakota subject the grant to the identical condition precedent, Respondent will set forth only the

Rosebud materials as an example to clarify and substantiate this position.

A few years after the Sisseton-Wahpeton Agreement was ratified, the Department of the Interior instructed that negotiations be commenced with the members of the Rosebud Sioux Tribe for a cession of a portion of their reservation. The operative language of the concluded cession agreement is identical, in all material respects, to that of the Sisseton-Wahpeton Agreement: "[C]ede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to . . ." S. Doc. No. 31, 57th Cong., 1st Sess. 28 (1901). As was the case in the Sisseton-Wahpeton Agreement, the school land grant provision was not incorporated into the cession agreement. B.P. at 30. Rather, again as in the Sisseton-Wahpeton case, the agreement was amended in Washington by the Senate Committee on Indian Affairs. This time, however, a full and concise explanation of the necessity for the amendment was related by the Senator who had sponsored the legislation: An explanation which is totally inconsistent and inherently in conflict with the argument of Petitioner that the 1891 Sisseton-Wahpeton Act did not restore the unallotted land to the public domain and thereby disestablish the Lake Traverse Reservation.

On the first day the Rosebud cession agreement was presented on the floor of the Senate for ratification, Senator Gamble of South Dakota immediately proposed, and the Senate immediately agreed to, without discussion, the school land grant amendment. He then explained the necessity for the amendment to the Senate:

> Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. *This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain.* 35 Cong. Rec., 3187 (1902) (emphasis added).

The provision of the enabling act to which Senator Gamble referred provided:

> Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain.* Act of February 22, 1889, ch. 180, 25 Stat. 676 (emphasis added).

The House later received an identical explanation from South Dakota's Representative Mr. Charles Burke, who later served as Commissioner of Indian Affairs and was equally as active and knowledgeable in Indian Affairs as Senator Gamble, particularly in this area of reservation legislation:

> Mr. BURKE: I am glad that the gentleman has asked me that question. I would state that under the *enabling act* under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, and *it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain.* That enabling act was passed by Congress on the 22nd day of February, 1889. In March of that same year Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or eleven millions of acres of land, and made an express appropriation, in accordance with provisions of the enabling act, to pay outright out of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the treaty.
> Mr. FINLEY: Then, as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union.

Mr. BURKE: Yes.
Mr. FINLEY: And not otherwise?
Mr. BURKE: No. 38 Cong. Rec. 1423 (1904) (emphasis added).

As stated above, this same explanation, that the reservations or portions thereof would be disestablished and restored to the public domain by the pending cession legislation, the condition precedent in the enabling act to making operative the school land grant, is repeatedly contained in the *Congressional Record* and the House and Senate documents. The most comprehensive account of this effect is set forth in S. Rep., No. 6838, which clearly and specifically attributes this same condition precedent to the *1891 Sisseton-Wahpeton Act*.

> Section 6 of the bill reserves sections 16 and 36 in each township for the use of the common schools, and grants the same to the State of South Dakota, and section 7 makes an appropriation to pay for the same at $2.50 per acre. This is following the *precedents* which have heretofore been established in the *opening* of other reservations in South Dakota, and is based upon section 10 of the act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:
>
> SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.*
>
> The following are the *precedents:*
> *By section 30 of the act opening and dividing the Great Sioux Reservation*, sections 16 and 36 were granted to the State, and an appropriation of $1.25 per acre was made to pay for same. Act approved March 2, 1889. (25 Stat. L., 898).
> By section 30, act approved March 3, 1891, *opening the Sisseton and Wahpeton Reservation*, the school sections were ceded to the State and an appropriation made, and the same were paid for at $2.50 per acre. (26 Stat. L., 1039.)
> By act of August 15, 1894, opening the Yankton Reservation, the school sections were ceded to the State and paid for at $3.75 per acre. (28 Stat. L., 313.)
> Act providing for sale of Rosebud Reservation, in Gregory County, school sections were ceded and paid for at $2.50 per acre, and act authorizing sale of a portion of the Lower Brule Reservation, first session of the (Fifty-ninth) Congress, school sections were ceded to the State and paid for at $1.25 per acre. H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907); S. Rep. No. 6838, 59th Cong., 2d Sess. 3 (1907) (emphasis added).

When one also considers the fact that this same school land grant was made in other cession agreements conceded by Petitioner to have diminished and restored to the public domain portions of other reservations on the same day, in the same bill, by the same Congress, the mere presence of Section 30 in the Sisseton-Wahpeton portion of the 1891 Act, es-

pecially in light of the conditions precedent to the grant, constitutes additional probative evidence, *on the face of the act*, that the 1891 Sisseton-Wahpeton Act was intended by Congress to restore the unallotted land to the public domain and thereby disestablish the Lake Traverse Reservation.[16]

5. The Preposition Argument: Indicia Contrary to Disestablishment or Diminishment of the Reservation.

(a) In the Act. Brief for Petitioner at 22 sets forth a partial quotation of the operative language of the 1889 Agreement in the following manner:

> Section 26, incorporating and ratifying the 1889 Agreement, states that the Sisseton and Wahpeton Bands sell 'all the unallotted land *within the limits of the reservation*[16] . . . remaining after the allotments and additional allotments . . .' (emphasis added). B.P. at 22 (emphasis as in original).

The italicized portion of the above quotation (*within* the limits of the reservation) is soon thereafter stated by Petitioner to be a part of the "indicia contrary to the disestablishment or diminishment of the reservation." B.P. at 22.

In the first place, the actual and complete wording of this portion of Section 26 puts the "within" in a somewhat more proper perspective:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made. Act of March 3, 1891, §26, 26 Stat. 1036 (1891).

16. There were no school land grants in the acts construed by this Court in *Seymour v. Superintendent*, 368 U.S. 351 (1962), or *Mattz v. Arnett*, 412 U.S. 481 (1973).

The "reservation set apart to said bands of Indians as aforesaid," which is referred to in the act, was aforesaid to be simply a "portion of land set apart and reserved to them by the third article of the treaty" of 1867. Thus the import of the "within" is simply a description that the cession was to encompass all of the unallotted land within the limits of the portion of land set apart for them in 1867—a natural, convenient, and shorthand way of identifying the land subject to the cession. At the time the description in the agreement was written, the reservation had not yet been disestablished. The preposition "within" therefore is not inconsistent with the fact that the reservation was to be disestablished by ratification of the cession agreement by Congress, and hence cannot in any manner be construed as "indicia contrary to the disestablishment or diminishment of the reservation." B.P. at 22.

If Justice Black in *Seymour* was referring to similar prepositions in the Colville Act that "in a manner" indicated that Congress intended that the Colville Reservation continue to exist as such, Respondent would have to take the position that the cession language of the Sisseton-Wahpeton Act and the legislative history and surrounding circumstances of the Sisseton-Wahpeton Agreement simply do not lend themselves to such a construction. *Seymour, supra*, at 359; N. 11 at 359. If Justice Black intended to refer only to the substance of the sections therein cited, as Petitioner evidently believes in its comparison (B.P. N. 41 at 60), Respondent would still maintain the same position. In either case, Respondent would respectfully submit that such a comparison would be delicate enough to justify a precise examination of the actual langauge of the acts and, in this respect, Petitioner's paraphrased versions in Note 41 will not suffice. B.P.N. 41 at 60.

(b) Before the Opening and in the Proclamation.

The Presidential Proclamation of 1892 is set forth in the following manner by Petitioner:

> . . . I, Benjamin Harrison, President of the United States, do hereby declare and make known that all of the lands *embraced in said reservation*, saving and excepting the lands reserved for and allotted to said Indians . . . [w]ill be opened to settlement . . . (Emphasis added). B.P. at 40 (emphasis as in original).

In the first place, a complete reading of the Proclamation again initially serves to place the "in" in a more proper perspective. *See* B.P. App. at 16-19.

Secondly, an examination of the maps of the Commissioner of Indian Affairs and the date of removal therefrom of ceded or disestablished reservations indicates in general that, administratively, such removals correspond to the year of the opening of the reservation rather than the date disestablishing the reservation or a portion thereof. Administratively, this method was undoubtedly for the convenience of a point of reference necessary in the completion of the paper work and the other procedures which always preceded the "opening." In fact, *until the opening* the area ceded was even carefully guarded and trespassers thereon removed and prosecuted under the then existing federal statutes. Evidently, such actions were a violation of these statutes because the area ceded was, at least administratively, technically still a reservation. Therefore many references, including proclamations, up to the date of the opening often refer to the area as "within," "in" or "on" the reservation. The phrases of November 10, 1891, (B.P.N. 30 at 42) and the March 22, 1892, "within the limits" (B.P. at 39) are perfect examples of this type of reference, and as such, are of no inherent probative value whatsoever.

In addition, for the President to have referred not only to the Act itself, when drafting the proclamation which would of course describe and refer to the lands to be ceded as "within," "in" or "on" the reservation, but also to the other contemporary documents similarly describing the area to be ceded, would seem to Respondent only logical. Indeed, this position is supported on the face of the proclamation:

> The lands to be opened for settlement are for *greater convenience* particularly described in the accompanying schedule, entitled 'Schedule of lands within the Lake Traverse Reservation *opened* to settlement by proclamation of the President dated April 11, 1892,' and which schedule is made a part hereof. B.P. App. at 19 (emphasis added).

The other phrases from the proclamation, set forth at 40 by Petitioner, are similarly without probative value in that they were intrinsically limited to a description of the location of the land ceded. It is somewhat anomolous that these same propositions and methods of land demarcations, which Petitioner would have this Court believe are probative of a congressional intent to maintain the Lake Traverse Reservation, appear throughout the acts, proclamations, and other peripheral materials of the other agreements ratified by the Act of 1891 which Petitioner concedes disestablished reservations or portions thereof.

(c) Later Prepositions Similarly Located or References of a Similar Nature.

Even a cursory examination of the subsequent legislative history and administrative treatment of reservations or portions thereof, which *were* undeniably disestablished and restored to the public domain, sheds considerable light on the validity of the preposition argument. In the main, even after the opening, similar references, although fewer in number, continue to contain the same prepositions for essentially the same reason: A natural, convenient, shorthand way of identifying the subject matter of the correspondence, not in any

way probative of a congressional intent in 1891 to maintain or preserve the Lake Traverse Reservation.

For example, the privilege of selecting allotments in the ceded area was extended, in many instances, until the date of the opening and therefore the correspondence would generally refer to allotments being made within or on the reservation. After the opening, the paper work and delivery of the actual trust patents to the allottees would sometimes take several years. Hence, the Annual Reports of the Commissioner of Indian Affairs and other miscellaneous correspondence would refer in both instances to patents, and the delivery thereof, being issued to allottees "within," "in" or "on" a portion of a reservation which had been disestablished by an act of Congress some years previous to the date in question. *See* Appendix II, at 142, with respect to trust patents in 1900 "on the North Half of the Colville Reservation" which had been disestablished for eight years. As was the case with the prepositions in the acts, proclamations and peripheral materials before the "openings," counterparts to the same phrases extracted by Petitioner *after* the opening, can be similarly extracted from the peripheral documents of the other "openings" ratified by the Act of March 3, 1891, which Petitioner concedes to have disestablished reservations or portions thereof.

In other instances, the same prepositions appear for no apparent reason in later documents. Such references will simply refer to "within," "in" or "on" a reservation that had for years been disestablished. Again, the only plausible explanation appears to be that such descriptions were merely points of reference, that is, a natural, convenient, shorthand way of identifying the subject matter. The North Half of the Colville Reservation which was specifically restored to the public domain is most illustrative of this very point. Respondent has, by way of Appendix II, set forth examples wherein miscellaneous references in the Annual Reports of the Secretary

of Interior and Commissioner of Indian Affairs continually referred to allotments, settlers, railroads, minerals, etc., as being "within," "in" or "on" the "North Half of the Colville Reservation." At the same time, the same materials refer to and contain the unambiguous and probative "former" and "heretofore a part of the Colville Reservation restored to the public domain" terminology. For a similar treatment of the ceded portion of the Great Sioux Reservation disestablished and restored to the public domain in 1889, *See* Appendix II. Other identical references to disestablished reservations appear throughout the excerpts in Appendix II, all of which aptly illustrate the invalidity of any such preposition argument as evidencing a subsequent recognition of the continuation of the reservation as such. When one Annual Report refers to the act that restored a portion of a reservation to the public domain and describes the new boundaries thereof, and the next Annual Report refers to the territory as formerly a part of the reservation ceded by the Act, while both of the same reports are replete with references to "within," "in" or "on" the reservation, no other explanation is plausible.

Unfortunately, the same situation can also be documented in the congressional documents and statutes. For purposes of illustration, consider the following remarks in the *Congressional Record* directed to a statute that was soon thereafter enacted:

> Mr. MARSHALL. Mr. Speaker, I ask unanimous consent for the present consideration of the bill which I send to the desk.
> The SPEAKER. The gentleman asks unanimous consent for the present consideration of the bill the title of which the Clerk will report.
> The Clerk read as follows:
>
> > A bill (s. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were *heretofore* a part of the Rosebud Indian Reservation

> with the limits of Gregory County, S.Dak. . .
>
> Mr. UNDERWOOD. Mr. Speaker, reserving the right to object, I would like to ask the gentleman as to whether this bill increases the size of the homestead?
> Mr. MARSHALL. No, sir; it does not. This bill simply gives to the settlers *on* the . . . Rosebud Reservations, which were opened by proclamation last fall, an extension of time of about sixty days, until May 1, to move on their lands and make improvements.
> Mr. UNDERWOOD. It does not increase the size of the homestead?
> Mr. MARSHALL. Not the slightest . . . . 39 Cong. Rec. 1853 (1905) (emphasis added).

It is because of apparent inconsistencies such as this, that Respondent has relied primarily on and attempted to structure this Brief around the *proper historical perspective* of the legislative history and surrounding circumstances of the Sisseton-Wahpeton Agreement. In fact, but for the reliance on similar preposition arguments in some of the recent opinions recognized by Petitioner (B.P. at 39-43), wherein attempt to capitalize on this very argument is made, Respondent would not have indulged in such a lengthy response.

The final aspect of the preposition argument remaining to be discussed is its use in conjunction with the "open"reservation terminology. Many references and statutes exist wherein the subject is referred to as being "within," "in" or "on" a reservation or portion thereof "opened" by a particular act. Typically, such a statement would read as follows: Lands *within* a portion of the Crow Reservation *opened* by the Act of March 3, 1891. It is to be noted that such a statement does not refer to "lands [now] within the portion of the Crow Reservation *opened* by the Act of March 3, 1891" nor does it refer to "lands [formerly] within the portion of the Crow Reservation *opened* by the Act of March 3, 1891." In essence, such a sentence is merely a statement of the issue to be decided, that is, whether the lands within the portion of the reservation opened by the Act of March 3, 1891, are *now* within the boundaries of the Crow Reservation. In this context the preposition "within" is meaningless and to equate "opened" with either disestablishment or nondisestablishment would be a classic example of begging the question. Although a form of the word cession is subject to this same analysis if substituted for "opened," the plain and natural meaning of the term renders it less susceptible to a misconstruction than the word "opened." However, in certain instances even a form of the word cession, when used in conjunction with the word opened, can be similarly confusing in this respect.

In the later Sisseton-Wahpeton documents this particular aspect of the preposition argument never really poses much of a problem because in most instances there is no reference to the reservation at all, just to the members of the tribe or band, which is of itself probative of the disestablishment in 1891 of the Lake Traverse Reservation.

In any event, the persuasiveness of the preposition argument would appear to be waning, especially if the detailed examination of the legislative history in the *Mattz* opinion as compared to the opinion in *Seymour,* is any indication of this Court's view of the importance of the substance of the argument.[17]

For Respondent's position as to the probative value of references to an existing Lake Traverse Reservation in the 1930's, 1940's, or 1970's, which appear to be *more* than a mere natural, convenient, shorthand way of identifying the subject

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17. A detailed examination of the preposition argument as presented to some of the courts below can be found at Appendix III, 130-135, Appendix IV, Sec. 2, 66-73.

matter in whatever documents that might exist, see the discussion at 112-113, *supra*."

Two perfect examples, which are also illustrative of the dangers inherent in attempting to ascertain the intent of Congress by the utilization of some peripheral Interior Department documents, are the Land Decisions cited by Petitioner. B.P., N. 16 at 22, 41. Petitioner has stated that the two decisions "expressly state the contemporaneous understanding that the Act did not disestablish or diminish the reservation." B.P. at 41. As such, "these early interpretations of the 1891 Act should be given great weight in ascertaining Congressional intent." B.P. at 42. To support this position, Petitioner has set forth quotations from the decisions wherein the area in question is described as "in the Sisseton and Wahpeton Indian reservation," "in the Lake Traverse reservation" and "ceded land, lying within the Sisseton and Wahpeton Indian reservation, known as Lake Traverse reservation." B.P. at 41.

The first prepositional phrase is meaningless in light of the fact that the complete sentence represents a perfect example of the use of the preposition argument in conjunction with the opened terminology.

> This land is *in* the Sisseton and Wahpeton Indian reservation, which *was opened* to settlement by the President's proclamation, dated April 11, 1892, in pursuance of the act of Congress of March 3, 1891, (26 Stat., pp. 1036-1038, Sec. 30). Madella O. Wilson, 17 L.D. 153, 154 (1893) (emphasis added).

While the reference to "ceded land, lying within the Sisseton and Wahpeton Indian reservation, known as Lake Traverse

18. For example, *See* 58 I.D. 455 (1943). With respect to ascertaining the intent of Congress in *1891*, Respondent would merely note: (1) the opinion was written in *1943*; (2) the views therein conflicted with those of the Commissioner of Indian Affairs; (3) nothing in the opinion indicates that the author was even aware of the fact that the unallotted land of the original Lake Traverse Reservation had been ceded and opened to settlement in 1892; (4) the 1948 statutory definition of Indian Country was enacted after the opinion was written, 18 U.S.C. § 1151(c); (5) the opinion conflicts with subsequent decisions of the Department of the Interior.

reservation" is *initially* somewhat more confusing, an examination of other similar Land Decisions not only serves to dispell the confusion but also aptly and unequivocally negates whatever probative value such phrases might have been deemed to possess. For example, when a portion of the Great Sioux Reservation was ceded in 1889, the remaining area was specifically divided into a number of smaller reservations. No one would question that the Great Sioux Reservation as such, ceased to exist in 1889. Nevertheless, the Land Decisions similarly described the ceded portion of the Great Sioux Reservation as being within the Great Sioux Reservation in 1893, 1895 and 1899!

> an allotment within the ceded portion of the Great Sioux reservation in Dakota, . . .
> an allotment in the ceded portion of the Great Sioux reservation. *Black Tomahawk v. Waldron*, 17 L.D. 457 (1893).

> This land lies within the ceded part of the great Sioux reservation in South Dakota which was opened to settlement and entry by the act of March 2, 1889. . . . *Crow v. Knowles et al.*, 20 L.D. 562 (1895).

> The act of March 2, 1889 (25 Stat., 888), provides for the establishment of a number of smaller reservations within the boundaries of the Great Sioux Indian reservation, the cession of the lands not included in such smaller reservations, the disposal of the lands so ceded, and the allotment to the individual Indians. . . . *St. Francis Mission*, 29 L.D. 331 (1899).

Respondent would therefore submit that with respect to the issue in the instant case, the Land Decisions as such, are entitled to something *less* than "great weight in ascertaining Congressional intent." B.P. at 42.

6. "Various Agreements Hereinbefore Mentioned," Act of March 3, 1891, §38, 26 Stat. 1046 (1891).

As "indicia contrary to disestablishment or diminishment of the reservation," Petitioner lists Sections 28 and 30 of the Act of 1891 which withheld from settlement the land upon which religious societies or other organizations might have been situated and the section 16 and 36 school land grant. B.P. at 22. In light of the fact that the substance of both sections was specifically included within general Sections 35 and 38 at the end of the Act of March 3, 1891, which applied to *all* of the *"various agreements hereinbefore mentioned,"* agreements Petitioner has conceded disestablished and diminished reservations, neither section can realistically be said to support Petitioner's assertion. The mere fact that in both respects Congress treated all of the agreements the same would seem, under standard rules of statutory construction, to indicate that the Lake Traverse Reservation was similarly disestablished. At worst, the section would be of no probative value whatsoever in this instance.

It is interesting to note in passing that in the Sisseton-Wahpeton Act all of the unallotted lands were actually ceded to the United States subject to a pre-emptory right of any "religious or other organization" then occupying the same to purchase them from the United States Government. Presumably, this even included the land upon which the agency was located. Certainly this method can be contrasted with the situation in *Seymour, supra,* and *Mattz, supra,* wherein entire tracts upon which villages, religious organizations and other cites were located, were specifically excluded from the entire operation of the legislation therein and reserved for the benefit of the members of each respective tribe.

7. "Whereas Clauses."

Similarly untenable is the assertion by Petitioner that the "two 'whereas' clauses of the 1889 Agreement, Section 26 of the 1891 Act, also refute any intent to disestablish or diminish the reservation." B.P. at 23. Petitioner's argument in this instance is two-pronged. The first prong encompasses both clauses: Since the negotiations were only for the purchase and release of unallotted *land* and the members of the Sisseton and Wahpeton Bands were only desirous of disposing of unallotted *land,* this underscores "the intent of the Indians and of Congress to dispose of the unallotted *lands* and nothing more." B.P. at 23 (emphasis added). Hence, the reservation was not disestablished or restored to the public domain. B.P. at 23.

Although the discussion of the operative "cession" language, *supra,* disposes of Petitioner's land argument in this respect, it should be noted that the negotiations were generally authorized for the purchase and release of "such *portion of reservations,* not allotted." Act of March 3, 1891, § 26, 26 Stat. 1032, 1036 (1891) (emphasis added). The election to cede all of the reservation, not allotted, instead of just a portion thereof, was made by a majority of the members of the Sisseton-Wahpeton Tribe.

The second prong of the argument is founded upon the fact that the negotiations were required to be conducted "in conformity with the treaty or statute under which such reservation is held." Act of March 3, 1891, §26, 26 Stat. 1032, 1036. Like the authorization provision above, this is simply another portion of the Dawes Act which, enclosed in

quotations, was incorporated into the first section of the 1889 Agreement. It is beyond question that the import of the provision relates solely to the conditions precedent imposed by treaty insofar as a further cession of the reservations was concerned: Namely, the number of signatures of adult male members of the tribe required as an indication of "consent" to such a cession. Repeatedly the instructions to the various Commissions contained precisely this and only this explanation. *See Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

In most treaties, the concurrence of three-fourths of the adult male members of the tribe was required to validate such a cession. However, the Sisseton-Wahpeton Treaty of 1867 was an exception. The treaty did not specify any prerequisite number of signatures. Therefore, in his request for Departmental approval on June 21, 1889, the Acting Commissioner of Indian Affairs called this very fact to the attention of the Secretary of the Interior by setting forth the conformity clause and specifically noting that "The treaty of 1867 contains no provisions applicable to such negotiations." Appendix I, 23.

On August 13, 1889, the Commissioner of Indian Affairs also specifically noted in his instructions to the Sisseton-Wahpeton Commission after setting forth the "conformity" clause that "[t]he treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof." Appendix I, 27.

Even the members of the Sisseton-Wahpeton Tribe were aware of this fact, as evidenced in the transcripts of the negotiation:

> This little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell . . . Why is it that it takes three-fourths at other agencies to rule while with us you say it takes only a majority. Our treaty does not provide for the sale of this land. . . . C.T. at 25, 28.

The answer to why Petitioner has attempted to attribute a different meaning to a simple statement of the Dawes Act, appears in the *New Town* opinions. *City of New Town* v. *United States*, Civ. No. 1038 (January 26, 1971), *City of New Town v. United States*, 454 F.2d 121 (CA 8 1972).

In both of these decisions the courts therein had to rely exclusively on the text of the act to decide an issue similar to the one presented in the instant case. In this position they accepted a very sophisticated argument of the tribe founded upon a provision of the act that recited:

> *Provided*, That nothing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act. Act of June 1, 1910, 36 Stat. 455.

This argument in its final form, as succinctly set forth in the portion of the opinion quoted by Petitioner, proceeds as follows:

> The right to have the reservation boundaries remain undiminished carries with it many important subsidiary rights, among them the right for unemancipated Indians to be subject only to federal and tribal jurisdiction. The 1910 Act specifically recognized that the opening of the reservation for homesteading was not intended to deprive the Indians of any rights not inconsistent with the Act, [i.e. the "nothing in this Act" provision set forth *supra*] and as *Seymour* established, homesteading is not inconsistent with the maintenance of the original reservation boundaries. The 1910 Act clearly by its own terms does not purport to alter the reservation boundaries. 454 F.2d 121, 125. B.P. at 27.

Petitioner's paraphrased version, tailored to the Sisseton-Wahpeton materials, is similarly succinct:

> The first 'whereas' clause stipulates that the negotiations with the tribe must be 'in conformity with the treaty or statute under which such reservation is held. The reservation is held pursuant to the 1867 Treaty. The most important benefit of the Treaty was the Indians' right to a defined and secure permanent reservation. It was the right to that reservation so defined and secured that was expressly preserved to the Sisseton and Wahpeton Bands by the stipulation in the opening 'whereas' clause, Section 26, of the 1891 Act. To disestablish or diminish the reservation is to read that benefit out of the statute. The 1891 Act will not withstand such a construction. B.P. at 25.

In casting about for a provision to bring the Sisseton-Wahpeton materials, and hence the position of Petitioner, within the *purview* of this argument, Petitioner evidently was forced to choose the "conformity" clause, because unfortunately no provision in the Sisseton-Wahpeton Act even resembles the "nothing in this act" provision deemed significant by the courts in *New Town*. Even though Petitioner's attempt was patently unsuccessful, Respondent would submit that this type of analysis to support a "construction" of the 1891 Act that "refutes any intent to disestablish or diminish the reservation" and at the same time supports "internal sovereignty" is less than persuasive. B.P. at 23, 25, 27.

In any event, it is interesting to note that although Petitioner cites both *City of New Town v. United States*, 454 F.2d 121 (CA 8 1972), and *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (CA 8 1973), as deeming "similar" language significant, the "nothing" argument is rather conspicuously absent in the *Condon* opinion. B.P. at 25. Perhaps after noting that the very clause deemed significant in *New Town* also appeared verbatim in earlier cession agreements

which disestablished portions of reservations, the court in *Condon* decided to depart from the crux of its opinion in *New Town* — for an inalienable right to a secure reservation with a fixed boundary in an agreement to cede and disestablish a portion of that reservation would be a tenuous right at best. In effect, the "nothing" argument eventually destroyed itself. An extensive comment, cited by the court in the text of its opinion in *Condon*, questioned the validity of the *New Town* opinion in this respect, as well as others. New Town et al: The Future of an Illusion, 18 *S.Dak.L.Rev.* 85 (1973).

V

OF THE TWO RECENT DECISIONS WHICH CONSTRUED THE EFFECT OF THE ACT OF MARCH 3, 1891, ON THE STATUS OF THE LAKE TRAVERSE RESERVATION, ONLY THE DECISION OF THE COURT BELOW CLEARLY REFLECTS THE INTENT OF CONGRESS.

A. THE DECISION OF THE COURT BELOW REFLECTS WHAT HAS BEEN THE WEIGHT OF AUTHORITY FOR OVER FIFTY YEARS.

A brief review of the landmark state and federal decisions construing similar acts within the Eighth Circuit is a necessary prelude to a meaningful comparison of the two conflicting opinions below which construe the effect of the Act of March 3, 1891, on the status of the Lake Traverse Reservation. The first such case was *United States* v. *LaPlant*, 200 F. 92 (D.S.D. 1911). In *LaPlant* the court was asked to decide whether the Act of May 29, 1908, 35 Stat. 460, opening a portion of the Cheyenne River Reservation in South Dakota, diminished said reservation. Citing a portion of the Act that referred to the reservation "thus diminished," the court held that "no other meaning can be given to the words italicized than that the reservations were diminished, and they were diminshed by the act itself." *LaPlant, supra* at 94. Three years later this Court decided *United States* v. *Pelican*, 232

U.S. 442 (1914), which, in effect, affirmed this aspect of *LaPlant* opinion.

For reservations that were opened and the boundaries thus diminished, *LaPlant* and *Pelican* have been controlling — a result of which necessarily produced some checkerboarding of trust land in the opened area outside of the boundaries of reservations.

In 1922 the court in *United States* v. *Frank Black Spotted Horse*, 282 F. 349 (D.S.D. 1922), correctly rejected the impractical pattern of checkerborad jurisdiction within that portion of a reservation that had *never* been opened but that, nevertheless, was interspersed with fee and trust land.

For over 50 years *LaPlant* and *Frank Black Spotted Horse* have been followed in not less than 50 separate state and federal opinions which represented the unanimous view within the Eighth Circuit and, in general, the weight of authority throughout the United States. For example, *State* v. *Sauter*, 48 S.D. 409, 205 N.W. 25 (1925); *Kills Plenty* v. *United States*, 133 F.2d 292 (CA 8 1943), *cert. den.* 319 U.S. 759 (1943); *Application of DeMarrias*, 77 S.D. 294, 91 N.W.2d 480 (1958); *State ex rel. Hollow Horn Bear* v. *Jameson*, 77 S.D. 527, 95 N.W.2d 181 (1959); *State* v. *DeMarrias*, 79 S.D. 1, 107 N.W.2d 255 (1961), *cert. den.* 368 U.S. 844 (1962).

Even after this Court decided *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), which held that a 1906 act opened the Colville Reservation without diminishing the boundaries thereof, the state and federal courts within the Eighth Circuit did not find the opinion controlling because of the South Dakota acts which, on their face, opened and diminished reservations. *DeMarrias v. South Dakota*, 319 F.2d 845 (CA 8 1963), *aff'g* 206 F.Supp. 549 (D.S.D. 1962); *Lafferty v. State ex rel. Jameson*, 80 S.D. 411, 125 N.W.2d 171 (1963); *State v. Barnes*, 81 S.D. 511, 137 N.W.2d 683 (1965); *State ex rel Swift v. Erickson*, 82 S.D. 60, 141 N.W.2d 1 (1966); and most importantly *Beardslee v. United States*, 387 F.2d 280 (CA 8 1967), discussed in detail *infra*, which laid to rest any doubts that *Seymour* would be given wholesale application within the Eighth Circuit in derogation of the plain language of the acts opening the reservations therein.

Then in 1970, without the issue even being raised, much less briefed by the parties, a dissenting opinion in *United States ex rel. Miner* v. *Erickson*, 428 F.2d 623, 637-639 (CA 8 1970), *by way of footnote*, attacked the validity of the position of the State of South Dakota and the Eighth Circuit Court of Appeals with respect to whether *Seymour* was controlling *in all situations*. The footnote even specifically cited a then recent Memorandum of the Solicitor to the Commissioner of Indian Affairs as "a strong indication that the lands were not restored to the public domain" by an act opening a portion of the Fort Berthold Reservation to settlement in 1908. *United States ex rel. Miner, supra*, Note 11, at 638. To insure that no one missed the point, the footnote concluded with the reminder that a:

> Strong argument can be made under the language of *Seymour v. Superintendent, etc, supra*, that the Act 'did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.' *United States ex rel. Miner, supra*, N.11 at 639.

Had briefs been presented on the merits of the "strong argument," Respondent would respectfully submit that perhaps the dissent would have recognized the fundamental distinction between the 1906 Colville Act in *Seymour* and the South Dakota Acts — *a* distinction even the Petitioner in *Seymour* noted and stressed in its brief on the merits:

> Both *LaPlant* and *Sauter* dealt with the Act of May 29,1908, 35 Stat. 460, which authorized sale and disposition of two tracts of land of the Cheyenne River and Standing Rock Reservations in South Dakota. Section 2 of that act refers to the respective reservations as 'thus diminished'. The reports of the Congressional committees referred to the reservations as 'diminished' and 'reduced' should the bill, which became the Act of May 29, 1908, become law. S. Rep. No. 439 and H.Rep. No.1539, 60 Cong., 1st Sess. The Act of 1908, like the Colville Act of 1906, makes the United States trustee for the Indians in sale of the lands, *but there is no provision or legislative history relating to the Colville Act* which shows that Congress intended to change the Colville boundaries *as it did the boundaries of the South Dakota reservations.* Brief for Petitioner at 11, *Seymour* v. *Superintendent*, 368 U.S. 351 (1962) (emphasis added).

It is not difficult to visualize the subject of the declaratory judgment that was commenced a few months later and which represents the beginning of the wholesale application by the Eighth Circuit Court of Appeals of the *Seymour* rationale to each and every piece of reservation legislation even resembling the act construed therein. That action, *City of New Town v. United States*, Civ. No. 1038 (January 26, 1971), questioned the boundaries of the Fort Berthold Reservation in North Dakota.

In *New Town* the Court of Appeals held that the boundaries of the Fort Berthold Reservation were not diminished by legislation that had for over fifty years been considered to have diminished the reservation. *City of New Town* v. *United States*, 454 F.2d 121 (CA 8 1972). The court based its decision on the rationale of *Seymour*. Six months later the South Dakota Supreme Court, in construing similar legislation affecting a South Dakota reservation, reluctantly bowed to the Eighth Circuit Court of Appeals and overruled nearly fifty years of state case law in *State v. Molash*, 86 S.D. 558, 199 N.W.2d 591 (S.D. 1972). The concurring opinion of Chief Justice Biegelmeier suggested that it might be "in the public interest" for the Attorney General of South Dakota to file a petition for certiorari and Judge Doyle concurred in the suggestion. *Molash, supra* at 594.

At approximately the same time the Federal District Court for the District of South Dakota, construing another "similar" piece of legislation which was before it on *remand* by the Eighth Circuit Court of Appeals for further consideration of the issue in light of *New Town, supra*, very reluctantly held that the boundaries of the Cheyenne River Reservation were not diminished. *United States ex rel. Condon* v. *Erickson*, 344 F.Supp. 777 (D.S.D. 1972). Although the court stated it felt the boundaries were diminished by implication on the face of the act, *Seymour*, in light of the *New Town* position, *commanded* a contrary result.

The District Court *Condon* decision touched off a debate in the *South Dakota Law Review* concerning the rather conspicuous absence, in the opinions and in the briefs, of any substantial citations to legislative history. 18 *S.Dak.L.Rev.* 85 (1973). The debate, however, was not in time to affect the Eighth Circuit Court of Appeals' decision in *Condon, supra*, which held that the Cheyenne River Reservation was not diminished, even though the legislation being construed therein referred *on its face* to a portion of the area affected by the act to be restored to the "public domain" and the area unaffected to remain as "the diminished reservation." With respect to the public domain terminology on the face of the act, the court *reasoned* that such was probably either the result of "poor draftsmanship" or that Congress may have intended to restore only the small timber portion of the area opened to the public domain and then for only a limited period until the lands were sold to the homesteading settlers. *Condon, supra* at 687. With respect to the "diminished reservation" terminology on the face of the act, the court *reasoned* that diminished reservation didn't really mean diminished reservation boundaries. *Condon, supra* at 687, 688. The opinion referred to the decision as a "close" question and with

pride cited the dissenting footnote in *United States ex rel. Miner, supra. LaPlant, supra,* as well as the bulk of the prior state and federal precedent, was simply "no longer viable." *Condon, supra* at 689. Two months later, in *Mattz,* this Court stressed the importance of legislative history and found that the legislation considered therein did not terminate or disestablish the Klamath River Reservation. In October, the South Dakota Supreme Court, while citing *Seymour, Mattz* and the recent Eighth Circuit decisions, nevertheless found that an 1894 act nearly identical to the one in the instant case did express a congressional determination to disestablish the Yankton Reservation by restoring all of the unallotted land to the public domain. *State* v. *Williamson,*____S.D.____, 211 N.W.2d 182 (S.D. 1973). In December the Eighth Circuit Court of Appeals, overruling the Federal District Court, and effectively overruling the South Dakota Supreme Court, without even bothering to cite the instant case, held that the Lake Traverse Reservation had not been disestablished by the 1891 Act. *United States ex rel. Feather* v. *Erickson,* 489 F.2d 99 (CA 8 1973). Again, it was the rationale of *Seymour* and *Mattz,* and the broad application thereof in its own recent decisions, that was the deciding factor in the Court of Appeals. Although, in addition thereto, the court also relied heavily on the 50 page amicus brief submitted on behalf of the Association on American Indian Affairs, Inc., by counsel for Petitioner, which was essentially identical to the Brief for Petitioner in the instant case, with its very special treatment of legislative history and surrounding circumstances basically intact. Brief for the Association on American Indian Affairs, Inc., and the Sisseton-Wahpeton Tribe as Amicus Curiae, *United States ex rel. Feather, supra.*

All of which most recently resulted in an extensive review of legislative history by the parties and the court in *Rosebud Sioux Tribe* v. *Kneip,* No. Civ. 74-4055 (D.S.D., filed Feb. 6, 1974) (mem.). In a well-written and extensively documented opinion, the Federal District Court for the District of South

Dakota, Western Division, in the face of *Seymour, Mattz* and the recent decisions of the Eighth Circuit, held that the Rosebud reservation *had in fact been diminished* by a series of bills enacted over a six-year period. Page after page of congressional documents were quoted in the text of this excellent 50-page opinion. *See* Appendix III, 143. This case is now on appeal with the briefs completed and oral argument set for September 12, 1974. *See* Appendix IV.

On March 15, 1974, the South Dakota Supreme Court, adhering to the fundamental analysis of the Federal District Court in *Rosebud Sioux Tribe, supra,* held that the Pine Ridge Reservation had also been diminished by an identical act. *Cook v. State,*____S.D.____, 215 N.W.2d 832 (1974). A habeas corpus proceeding has since been instituted in Federal District Court, *Cook v. State,* Civ. No. 74-4023, which is, as of this date, still pending.

B. THE DECISION OF THE COURT BELOW IS CONSONANT WITH AND REFLECTS FOUR PRIOR JUDICIAL CONSTRUCTIONS OF THE ACT OF MARCH 3, 1891.

The Supreme Court of the State of South Dakota, as the above sequence of decisions conclusively establishes, is completely aware of the decisions of the Eighth Circuit Court of Appeals and this Court construing acts similar to the Act of March 3, 1891. Petitioner's assertion that "the Court failed to apply time-honored rules for the construction of surplus land statutes" is wholly unfounded. B.P. at 5. In numerous instances it has cited and analyzed each and every surplus land decision cited by Petitioner, including *Mattz* v. *Arnett,* 412 U.S. 481 (1973). For example, as recently as 1972 the court felt compelled to hold that the boundaries of the Standing Rock Reservation were unaffected by the passage of legislation similar to the legislation construed in *Seymour* v. *Superintendent,* 368 U.S. 351 (1962), because of the broad application recently given *Seymour* by the Eighth Circuit

Court of Appeals, *State v. Molash*, 86 S.D. 558, 199 N.W.2d 591 (1972).

However, in the instant case the court could not agree with the rationale of either the recent Eighth Circuit decisions or the two leading decisions from this Court. Therefore, it found that the land affected by the 1891 Act was restored to the public domain and that the Lake Traverse Reservation had been effectively disestablished. This finding is wholly consistent with the legislative history and peripheral materials presented herein concerning the effect Congress intended the 1891 Act to have on the Lake Traverse Reservation.

Secondly, having found the Lake Traverse Reservation to have been disestablished by the 1891 Act, the decision of the Supreme Court of South Dakota is *not*, as repeatedly stated in both the Petition and Brief for Petitioner, "irreconcilable with, and a misconstruction of 18 U.S.C. §1151 which defines Indian Country as including 'all lands within the limits of any Indian reservation . . . notwithstanding the issuance of any patent.'" Pet. at 7, B.P. at 5-6, 29, 49-52. The court found that the reservation was disestablished by the 1891 Act and therefore that portion of 18 U.S.C. §1151 cited by Petitioner would not be applicable because none of the land in question would be "within the limits" of any reservation. If the reservation was in fact disestablished, the remaining trust land would, of course, fall within the criminal definition of Indian Country set forth at 18 U.S.C. §1151(c) and this fact was recognized by the court below.

To substantiate its position, the opinion below cited and analyzed the long prior history of judicial interpretation given the Act of March 3, 1891, all of which is consistent with the conclusion reached below. Specifically, in 1958 the South Dakota Supreme Court in *Application of DeMarrias for Writ of Habeas Corpus*, 77 S.D. 294, 91 N.W.2d 480 (1958), held that, by virtue of the ratification of the 1889 agreement, the Sisseton-Wahpeton Indians ceded the lands to the United

States, and that the lands were thereby restored to the public domain. In *DeMarrias*, although the Court found the Lake Traverse Reservation as such to be effectively disestablished, it specifically noted that it found nothing contained in the 1889 agreement indicating an intention to dissolve the tribal government. The court stated:

> In fact, the tribal organization is still existing. Their Tribal Constitution was approved by the Commissioner of Indian Affairs on October 16, 1946. Article I recognizes the limited extent of their jurisdiction in the following language: 'The jurisdiction of the Sisseton-Wahpeton Sioux Tribe shall extend to *all Indian-owned lands* lying in the territory within the *original* confines of the Sisseton-Wahpeton Lake Traverse Sioux Reservation.' Application of DeMarrias for Writ of Habeas Corpus, 77 S.D. 294, 91 N.W.2d 480, 484 (1958) (emphasis added).

If the Lake Traverse Reservation had never been disestablished the emphasized terminology set forth above would have been superfluous in light of the then existing state and federal case law rejecting "checkerboard jurisdiction" *within* the boundaries of reservations.

In *State* v. *DeMarrias*, *79 S.D. 1, 107 N.W.2d 255 (1961)*, *cert. den.* 368 U.S. 844 (1962), the South Dakota Supreme Court reaffirmed its earlier decision in another case involving the same defendant wherein a similar issue was raised. Habeas corpus proceedings were then commenced in the United States District Court for the District of South Dakota, Northern Division, but the court denied the writ. *DeMarrias* v. *State of South Dakota*, 206 F.Supp. 549 (D.S.D. 1962). Significantly, the opinion cited and distinguished the then

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19. In this portion of the opinion, the court was comparing the fact situation in *Ewegah v. United States*, 186 F.2d 93 (CA 10 1950), with the Sisseton-Wahpeton situation. Both courts concluded that the respective reservations had been disestablished by substantially identical cession agreements.

recent decision of this Court, *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), and an appeal was taken.

The Eighth Circuit Court of Appeals affirmed upon the basis of the trial court's "well-reasoned" and "carefully considered opinion." *DeMarrias v. State of South Dakota*, 319 F.2d 845, 846 (CA 8 1963), *aff'g* 206 F.Supp. 549 (D.S.D. 1962). Although the court did state, in connection with the weight of an agency interpretation, that the laws were somewhat ambiguous as Petitioner has pointed out (B.P., N. 35 at 80), it concluded that:

> The trial court in its opinion has *clearly demonstrated* that the effect of the foregoing transactions was to restore the unallotted lands which the Indians ceded to the *public domain* and to remove such unallotted lands from the category of Indian country. *DeMarrias, supra* at 846 (emphasis added).

Significantly, the opinion also noted that the trial court had more than adequately distinguished *Seymour, supra*.

Each of the foregoing opinions was soundly based upon a careful reading of the Act of March 3, 1891. In addition, the Federal District Court engaged in an in-depth analysis of the special state and federal statutes which were in force concerning the South Dakota reservations after the turn of the century. *DeMarrias* v. *State of South Dakota*, 206 F.Supp. 549, 550, 551 (D.S.D. 1962).

At the time the court below analyzed the Act of March 3, 1891, nothing in the recent opinions could fairly be said to have cast substantial doubt on the validity of the *DeMarrias* decisions. Petitioner's assertion that the decisions were "long discredited" and that "every legal underpinning" had been swept away prior to the consideration of the issue in the instant case is without support in the opinions of the recent decisions. B.P. at 5, 56.

Similarly untenable and somewhat confusing is the attempt of Petitioner to portray the opinion of the court below as relying solely on the rationale of the District Court in *DeMarrias*. An assertion by Petitioner which purportedly compelled approximately six pages of careful scrutiny of that opinion. B.P. at 48-56. The opinion of the court below did not even mention the "opened"and "closed" reservation distinction set forth by Petitioner, much less, the administrative and judicial treatment thereof, unheard of by Respondent, which most definitely added to the confusion.

Respondent would submit that the opinion of the court below was certainly a more suitable subject for such a detailed examination. For example, the South Dakota Supreme Court aptly described the agreement and its effect on the Lake Traverse Reservation in the following manner:

> By the very terms of this agreement, the Sisseton and Wahpeton Bands of Indians sold their unallotted lands, and the United States Government paid a sum certain for each and every acre purchased. The money was deposited in the United States Treasury and the United States agreed to pay interest thereon. All the money was to be used for the sole benefit of the Indians. This, then, was an outright cession and sale of lands by the Indians to the United States. The land sold was separated from the reservation by Congress and became part of the *public domain*. In this agreement the United States did not contract to act as trustee to sell the land for the Indians and credit the proceeds to the tribe. The government agreed to purchase the land outright. *DeCoteau v. District Court*, ____ S.D. ____, *211 N.W.2d 843, 845 (1973) (emphasis added).*

In essence the court below did, to an extent, rely on the *DeMarrias* decisions and the federal jurisdictional statutes then in effect, to assist it in resolving the issue. Admittedly, none of the *DeMarrias* decisions analyzed the legislative history as this Court did in *Mattz, supra*, but neither did the

Eighth Circuit Court of Appeals in *United States ex rel. Feather* v. *Erickson*, 489 F.2d 99 (CA 8 1973).

C. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IN *UNITED STATES EX REL. FEATHER V. ERICKSON* IS CLEARLY ERRONEOUS.

1. A Conflict among the Circuits.

Approximately one month after the decision of the court below in the instant case, the Eighth Circuit Court of Appeals in *United States ex rel. Feather v. Erickson, supra*, for reasons that were to become evident in the course of its opinion, reversed the lower court, overruled the *DeMarrias* decisions, effectively overruled the court below and created a conflict among the Circuits. Although the *Feather* decision involved a criminal issue, the question presented was identical with respect to the effect of the Act of March 3, 1891, on the status of the Lake Traverse Reservation. *Sub silento*, the court ignored the established line of decisions in the Tenth Circuit that have long held that cession agreements identical in all material respects to the one in the instant case disestablished reservations. *See* the discussion of *Ellis v. Page*, 351 F.2d 250 (CA 10 1965), and *Tooisgah v. United States*, 186 F.2d 93 (CA 10 1950), *supra*, declaring directly and by innuendo the *non-reservation status* of over one-half of what is now the State of Oklahoma. Respondent would respectfully submit that nothing in the *Feather* opinion renders the analysis of the Tenth Circuit any less persuasive. This is especially so in light of the rather conspicuous absence of citations in the opinion to another Circuit Court of Appeals decision wherein an outright cession to the Government of the United States was held not to have diminished or disestablished the reservation. Brief for Petitioner is of no assistance to the Eighth Circuit in this instance. Petitioner cites *Tooisgah, supra*, to support a proposition contrary to the express holding therein and omits all reference to *Ellis v. Page, supra*. B.P., N. 37 at 51.

2. The Distinction.

In addition to the failure of the court in *Feather* to recognize the significance, in general, of the cession and "subject to the laws of the State" language of the 1891 Act discussed *supra*, the opinion in *Feather* becomes even less persuasive in light of a most important distinction which was apparently overlooked.

Evidently, the Eighth Circuit Court of Appeals could not "against the glare of *Seymour* and the more recent judicial guidance in *Mattz, Condon* and *New Town*" distinguish between the situations therein and the outright cession to the Government presented in the instant case. *Feather, supra* at 102. Contrary to the plain language of the Act of March 3, 1891, the court nevertheless stated:

> Just as in the beforementioned three cases the reservation here was *not* sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. *Feather, supra* at 101 (emphasis added).

Petitioner has compounded the misconstruction by reiterating that:

> Contrary to *DeCoteau* in the court below, *Feather thoroughly* reviewed the surrounding circumstances and legislative history of the 1891 Act. *The Eighth Circuit found* that the 'reservation here was not sold to the government outright but was merely opened for settlement under the homestead laws and the 1887 general allotment plan.' B.P. at 56 (emphasis added).

Respondent would submit that this failure of the Court of Appeals to recognize this fundamental distinction resulted in a decision which is clearly erroneous on its face and the attempt of the United States as *amicus curiae* to reconcile the conflict in its memorandum merely adds fuel to the fire.

> Both forms of statute, with some variations in wording, were repeatedly used in opening reservations under the General Allotment Act. The earlier statutes tended to be written in terms of sale of unallotted land to the government for homestead purposes, while the later statutes often spoke of ceding unallotted land in trust to the government for homestead purposes. Memorandum of the United States as Amicus Curiae in No. 73-1148, at 6, *DeCouteau v. District County Court for the Tenth Judicial District (1974).*

All three of these statutes which the United States cites, in Note 3 in the above quotation, as examples of "only two of the techniques employed by the government to allow homesteading *within* Indian reservations" *disestablished* portions of the reservations unequivocally and forever. Memorandum of United States as Amicus Curiae in No. 73-1148, N. 3 at 6, *supra*, (emphasis as in original). How these three can then be "*contrasted* with statutes terminating reservations, or changing or diminishing their boundaries" is beyond the comprehension of Respondent. Memorandum of the United States as Amicus Curiae No. 73-1148, N. 3 at 6, *supra* (emphasis added). In effect, the United States has thereby not only strongly supported the position of Respondent and cast considerable doubt on the validity of the *Feather* decision, but also has essentially undermined the crux of its own argument.

In this light the 1963 position of the United States Attorney for South Dakota, with "express approval of the Department of Justice at Washington, D.C.," that this *same* act disestablished this *same* reservation would appear somewhat more persuasive. *DeMarrias* v. *State of South Dakota*, 319 F.2d 845, 847 (CA 8 1963), *aff'g* 206 F.Supp. 549 (D.S.D. 1962) (emphasis added).

3. The Glare of Precedent.

The failure of the *Feather* decision to even recognize a cession to the United States for a sum certain also exemplifies the reason for the criticism Respondent has directed at the "recent decisions" of the Eighth Circuit Court of Appeals: Namely, decisions in which a preoccupation with the "glare" of precedent and conformity of holdings have led to some rather tenuous results.

For example, in *City of New Town* v. *United States*, 454 F.2d 121(CA 8 1972).the court was presented with the question of what effect, if any, a 1910 act opening a portion of the Fort Berthold Reservation had on the 1891 boundaries of that reservation. The court held that the 1891 boundaries were not affected and concluded that:

> . . . the boundaries of the Fort Berthold Reservation are those specified in the Act of March 3, 1891, 26 Stat. 1032, and that the Act of June 1, 1910, 36 Stat. 455 and subsequent Acts did not alter those boundaries. *The City of New Town, supra* at 127.

One year later, the court applied the rationale of *New Town, supra,* to a South Dakota reservation and held that the act opening a portion of the Cheyenne River Reservation did not diminish the reservation. *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (CA 8 1973).

In the *Feather* decision the court cited *New Town* and *Condon* incessantly and held that the Act of March 3, 1891, had no effect on the boundaries of the Lake Traverse Reservation.

Respondent finds it very interesting that the 1891 Act which the court cited as *establishing* the boundaries of the Fort Berthold Reservation in *New Town*, did so by *disestablishing* approximately one half of what had previously been the Fort Bethold Reservation, while the 1891 Act construed in *Feather* had no affect on the boundaries of the Lake Traverse Reservation — interesting in that both acts were passed by the *same* Congress, in the *same* bill, on the *same* day and, in addition contained the *identical* operative *cession* language.

In the absence of some rational explanation for what would *ipso facto* appear to be an irrational congressional mind, this situation should certainly have raised some question. Yet the *Feather* opinion is silent on the point. Had the court realized the full import of the conflict, it is doubtful that the Sisseton-Wahpeton Agreement would have been treated as exemplifying the rule rather than the exception. This is especially so in light of a statement in the *amicus* brief of the American Association of Indian Affairs submitted to the Eighth Circuit Court of Appeals by counsel for Petitioner on behalf of the Sisseton-Wahpeton tribe, wherein the unusual treatment allegedly accorded the Sisseton-Wahpeton Agreement really manifests itself for the first time.

> . . . Significantly, of the seven reservations opened by the Act of March 3, 1891, the portions of land excluded from the reservation and the new boundaries resulting therefrom are specifically delineated by definite property lines for all but Lake Traverse." Brief for the Association on American Indian Affairs, Inc., and the Sisseton-Wahpeton Sioux Tribe as Amicus Curiae at 10-11, *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (CA 8 1973).

Although the revelation was made to support the position of the tribe in an indirect manner as it is in the instant case (B.P. at 16), surely the Sisseton-Wahpeton Agreement should no longer have been viewed as a typical homesteading statute — the only one of seven statutes passed on the same day, in the same bill, by the same Congress, which did not diminish or extinguish a reservation.[29] Indeed, this same preoccupation with generalizations should have led the court in *Feather* to the opposite conclusion — especially if it had carefully examined the congressional materials set forth in Part I, *supra*. Other than the citations to the House and

[29] Respondent has stated, *supra*, that as of this date, it has not conclusively established the *effect* of each and every agreement ratified by the Act of March 3, 1891, 26 Stat. 1016 (1891). In this respect, and for purposes of *this* paragraph it is relying on the statement in the Amicus Brief, *supra*, as well as the reiteration of this point by Petitioner, B.P. at 16.

Senate documents in Notes 6 and 7, there is no indication in the opinion that such an examination was made. *Feather*, *supra* at 102.

4. The Absence of Proposed Boundaries.

If Respondent's position is correct with respect to the analogy of the partial Crow opening set forth in Part I, *supra* at 51-74, the Lake Traverse Reservation would have been effectively disestablished by the passage of the Act of March 3, 1891, opening the reservation to settlement — irrespective of the fact that the Sisseton-Wahpeton Agreement had been tailored to the Dawes Act. After the opening the allotments therein would be situated on the public domain in the same manner as the Crow situation.

Similarly, just as there were no remaining boundaries encompassing the ceded or disestablished area in the Crow situation, there would be no remaining boundaries encompassing the ceded or disestablished area of the Lake Traverse Reservation. In the Crow situation this very fact *necessitated* the new or proposed boundaries separating the ceded area from the newly diminished reservation. In the Lake Traverse situation this same fact would *necessitate* that there be no new or proposed boundaries to even discuss for there would be no diminished reservation that would remain.

Even the *Feather* opinion substantiates this conclusion and hence the position of Respondent:

> Nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of the Congress regarding the *reservation boundaries*. The Committee reports on the 1891 Act and reports on similar bills that were not enacted do not discuss the *proposed boundaries* . . . .
>
> We must view as significant the fact that our search of the legislative documents subsequent to

> the 1891 Act unearths no telltale language as to the lawmaker's will concerning the *boundaries* of the Lake Traverse reservation. The significance lies, of course, in the test to be applied. This is, congressional expression or clear implication diminishing the *reservation boundaries*. *Feather*, *supra* at 102 (emphasis added).

In its proper historical perspective (i.e., in light of the materials presented in Part I, *supra*, and congressional intent clearly evidenced in the Crow situation and others passed the same day) the lack of proposed boundary discussion alone should have led the court in *Feather* to an opposite conclusion. Instead, the court completely misconstrued its significance and stressed in the *Feather* opinion that the lack of proposed boundary discussion indicated the continued existence of the Lake Traverse Reservation.

In this respect perhaps the court in *Feather* was misled by a statement appearing in the Brief for the Association on American Indian Affairs, Inc., and the Sisseton-Wahpeton Sioux Tribe as Amicus Curiae set forth *supra, and reiterated by Petitioner that:*

> Significantly, of the seven reservations opened for settlement by the Act of March 3, 1891, the portions of land excluded from the reservation and the new boundaries resulting therefrom are specifically delineated by definite property lines for all but Lake Traverse." B.P. at 16.

On its face, the 1891 Act simply does not support this assertion.

Although new boundaries were *necessarily described in those instances wherein the cession included only a portion of the surplus land, such as the Crow situation, supra,* not all of the agreements ratified by the 1891 Act were partial openings. In these situations, which parallel the Sisston-Wahpeton case wherein the allotments were numerous and still being issued, it would have been almost a practical impossibility for the Act to have specifically delineated by definite property lines the portion of land excluded from the cession. Accordingly, contrary to the assertion of the *Amicus* in *Feather*, reiterated by Petitioner before this Court, the 1891 Act on its face did *not* specifically delineate new boundaries in these instances. *See* Act of March 3, 1891, §§8-13, 26 Stat. 989, 1016-1024. Had the court in *Feather* independently examined the entire Act of March 3, 1891, this misconception would have been clarified.

5. A "Former" Reservation.[21]

In addition to the *DeMarrias* decisions, *supra*, and the opinion of the court below, the decision of the Eighth Circuit

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21. The other boundary argument of Petitioner, similarly untenable, is that the omission in the Sisseton-Wahpeton Agreement of a description recommended by the Commissioner of Indian Affairs in a letter of August 13, 1889, should be construed as "an indication that the boundaries of the reservation would remain unchanged." B.P., N. 8 at 16. The same letter cited by Petitioner not only disposes of the argument, but also supports an opposite conclusion:

> It is not considered advisable that the cession at this time should embrace all these surplus lands. A sufficient quantity should be reserved for future contingencies. Pet. App. at 42.

Because the Commissioner of Indian Affairs did not contemplate a cession of *all* of the surplus lands of the Lake Traverse Reservation at the time, some description would have been *necessary* in order to separate the ceded area from the diminished Lake Traverse Reservation. The omission of such a description in the final Sisseton-Wahpeton cession agreement which did encompass all of the surplus lands of the Lake Traverse Reservation, would seem to Respondent to suggest that there would be no Lake Traverse Reservation after the ratification of the agreement.

22. Because of the specific circumstances existing in *Mattz v. Arnett*, 412 U.S. 481 (1973), this Court found the phrase "what *was* [the] Klamath River Reservation" susceptible to more than one interpretation. Although the special circumstances present in *Mattz* are not present in the instant case, Petitioner has nevertheless stated that the phrase "former Lake Traverse Reservation" is subject to the same shorthand identification argument. B.P., N. 23 at 32. Respondent would agree with Petitioner that former Lake Traverse Reservation "may have been used as a shorthand identification" since that identification is susceptible of only one interpretation in the instant case: the 1891 Act disestablished the Lake Traverse Reservation. B.P., N. 23 at 32.

Secondly, in light of the fact that similar references to the "former Lake Traverse Reservation" can be documented in any year (*see* 9, *supra*), the argument of Petitioner to bring the phrase within the 1918-1920 span of confusion noted in *Seymour v. Superintendent*, 368 U.S. 351, N. 12 at 356 (1962), is untenable. B.P., N. 23 at 32.

It is interesting to note in passing that the recent decisions of *New Town*, *supra*, and *Condon*, *supra*, found the same "congressional confusion" in this respect *from 1905 on* that Justice Black thought only existed during the "short period of time" between 1918 and 1920. *Seymour*, *supra*, N. 12 at 356. *See* App. III, 97, 101, 108-112, 120-122; App. IV, Sec. 2, 29-33, 42-44, 58-60, 83-87, for a rather extensive compilation of this "confusion."

Court of Appeals in *Feather* is also inconsistent with the status of the Lake Traverse Reservation, as reflected in three earlier decisions involving the area in question, the first of which is *Farrell* v. *United States*, 110 F. 942 (CA 8 1901).

In *Farrell* the Eighth Circuit Court of Appeals upheld the conviction of a non-Indian for the sale of an intoxicating beverage to a member of the Sisseton-Wahpeton Band of Indians. Although nothing in the *Farrell* opinion is directed to the issue in the instant case, it is interesting to note that the existence of the Lake Traverse Reservation in the *present* tense was not an assumption upon which the decision rested. In several instances reference is made in the *past* tense to the fact that the "reservation of his band *was* opened to settlement" or that the "unallotted lands were opened to settlement." *Farrell, supra* at 947, 949 (emphasis added). In light of the recent openings in South Dakota and other states, all of which disestablished reservations or portions thereof, such references are understandable. See also the discussion of "opened," *supra* at 146-147. Similarly, the opinion does not refer to the Lake Traverse Reservation, but rather denotes the area in question as the "Sisseton agency" or just the "agency." *Farrell, supra* at 943, 944.

The only other major decision involving the original Lake Traverse Reservation is *United States* v. *Rickert*, 188 U.S. 432 (1903). In *Rickert* this Court held that the County of Roberts, South Dakota, could not collect taxes on certain improvements on, and personal property used in the cultivation of, land in that county occupied by members of the Sisseton Band of Sioux Indians. Like *Farrell*, the crux of the decision centered around the fact that the occupants were still wards of the United States. In this respect the decision probably cannot be said to shed any significant light on the issue presented herein. However, Respondent would submit that a close reading of the opinion reveals that in 1903 the land so allotted was not then considered to be within the boundaries of any reservation. Time and time again the land so situated

was referred to as simply "county of Roberts, South Dakota." *United States* v. *Rickert*, 188 U.S. 432 (1903). In fact the only specific present tense reference to the reservation in the opinion is:

> . . . that the said Indians are holding, and for several years last past have held, allotted lands in that county, and within the *former* Sisseton Indian Reservation . . . . *United States* v. *Rickert, supra* at 432 (emphasis added).

It is also interesting to note that the opinion of the lower court in *Rickert* substantially reinforces the disestablished status of the Lake Traverse Reservation in this respect. *United States* v. *Rickert*, 106 F. 1 (CA 8 1901). Again, there is a continual reference to the "Indians residing in the county of Roberts" and the "Sisseton agency situate and being in the county of Roberts, state of South Dakota." *Rickert, supra* at 1, 2. Similarly, the only specific reference in the *present* tense in this opinion to the reservation is:

> [A]llotted lands within the said Roberts county and within the *former* Sisseton Indian reservation, which lands, hereinafter described, were allotted to the said Indians under the provisions of the agreement of December 12, 1889, as ratified by the act of March 3, 1891, . . . *Rickert, supra* at 2 (emphasis added).

Although such "former" references are by themselves of negligible probative value, when read in context with the tenor of the remainder of the opinion, they nevertheless reflect the status of the Lake Traverse Reservation in the mind of this Court and the lower courts in the early 1900's. In addition, when one considers the weight of authority commencing shortly thereafter with *LaPlant, supra*, and *Pelican, supra*, and the continuous adherence to the analysis therein by a multitude of other courts, up and through the *DeMarrias* decisions, confirmed by the Eighth Circuit Court of Appeals as recently as 1967 in *Beardslee* v. *United States*, 387 F.2d 280 (CA 8 1967), the respect for precedent seems to have been

somewhat slighted.[24] Nearly 70 years of judicial analysis might have simply been erroneous, but one could not support that conclusion with the documentation and the rationale contained in either the Brief for Petitioner or the *Feather* decision. Most significantly, the examination of the legislative history and surrounding circumstances of the 1891 Act only serves to further erode the persuasiveness of such a position.

6. The Intent of Congress.

If the *Feather* opinion does not accurately reflect the intent of Congress in 1891, Respondent is, to a large extent, responsible. The judicial system is founded upon and functions best as an adversary proceeding, and Respondent simply has not recently lived up to its responsibility in this respect. Domestic difficulties within the State of South Dakota over the past two years have resulted in a burden on the staff and resources of Respondent, the result of which was simply that Respondent had not been able to adequately present the position of the state in the recent cases. Our brief in *Feather* was, unfortunately, no exception.

In the Court of Appeals in *Feather*, plaintiff-appellant submitted a cogent argument asking the court to depart from its 1963 position in light of certain recent decisions. Respondent relied exclusively on the 1963 position of the court presented in a similarly cogent three page argument. When on behalf of the Association on American Indian Affairs, Inc., as *amicus curiae*, counsel for Petitioner submitted its excellent 50 page brief with over 140 citations to legislative history, Land Decisions, and Archives materials, nearly identical to the Brief for Petitioner in the instant case, Respondent simply did not reply for the reasons set forth above. This is the reason for the statement in the Memorandum for Respondent's Concurrence that Certiorari Be Granted that

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24. This is especially so in light of the treatment accorded the analysis of the Tenth Circuit Court of Appeals discussed *supra* at 161.

since the *Feather* decision, Respondent has devoted considerably more time and effort to research that had not been presented below. Respondent has not, as respondent in *Feather* alleged, asked anyone to "buy a pig in a poke." Respondent's Brief in Opposition to Writ of Certiorari, at 5, *United States ex rel. Feather v. Erickson*, (1973).

Similarly, with respect to respondent's position in *Feather* that this "new material cannot properly be presented before this Court," Respondent would only state that it is somewhat disturbing to think that any one would want this Court to resolve an issue of congressional intent with any limitations imposed other than those this Court would impose upon itself.

The concurrence of Respondent that certiorari be granted in the instant case was founded upon the belief that this Court should authoritatively resolve the issue presented. If Respondent can render any assistance that the Court might deem helpful in this respect, it would be more than willing to assume that responsibility. Consistent with this position, a stipulation has been filed in the Office of the Clerk to the effect that Respondent will not resist any responsible party who might request this Court's permission to enter an appearance as *amicus curiae*.

VI

THE RATIONALE OF *SEYMOUR* and *MATTZ* DOES NOT REFLECT THE STATUS OF THE SISSETON-WAHPETON *CESSION* AGREEMENT RATIFIED BY THE ACT OF MARCH 3, 1891.

Parts I-III of this brief were devoted to an examination of the legislative history and peripheral materials of pure cession agreements and the one in the instant case tailored to the Dawes Act of 1887. Respondent has taken the position that the effect upon a reservation or a portion thereof with respect to the issue presented herein was one and the same; in

both instances the reservation or a portion thereof was effectively disestablished and restored to the public domain.

Although the Sisseton-Wahpeton Agreement was tailored to the Dawes Act of 1887, it was still of the sum certain variety, a cession to the United States with only the *proceeds* of the sale deposited "in trust" to the credit of the members of the Sisseton-Wahpeton Tribe. In this respect the operative language and arrangement in the Sisseton-Wahpeton Agreement and the 1891 Act are technically a world apart from the operative language and peculiar "trust" arrangement of the 1906 Colville Act construed in *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The exact and precise precursor of the 1906 Colville Act actually emanated from the congressional mind between 1901 and 1903. The Act of April 23, 1904, opening a portion of the Rosebud Reservation in South Dakota, was the first concrete manifestation of this type of complete "trust" arrangement. Act of April 23, 1904, 33 Stat. 254 (1904). Significantly, an examination of the legislative history of this and two later Rosebud acts indicates that a strong argument could be made that Congress did not intend to change the necessary effect of the earlier pure cession policy, even up to and through 1910.

Thus, one would have a continuity in policy from the time of the pure cession agreements to the modified Sisseton-Wahpeton Agreement up and through the trust statutes of the early 1900's. In the absence of some specific congressional intent to the contrary, this continuity of policy would unfold as a series of reservations disestablished or at least diminished by special acts of Congress "opening them to settlement." To the extent this Court might deem the rationale of either *Seymour* or *Mattz* controlling in the instant case, Respondent will therefore proceed in the alternative: 1. The rationale of *Seymour* and *Mattz* does not square with the explicit congressional intent evidenced by more than 25 years of

legislative history and related documents of the Office of Indian Affairs and should therefore be departed from. 2. Or in the alternative, that this Court in both *Seymour* and *Mattz* was involved in the construction of acts sufficiently distinguishable from the Sisseton-Wahpeton type of arrangement to limit the holdings to the facts presented therein.

At first glance such an alternative argument might seem unwarranted in light of the position that each case must be determined upon its own facts and legislative history, especially in view of the understandable and meritorious position that this Court would be reluctant to decide issues of a generalized nature. However, as evidenced by some of the general pronouncements in *Mattz* as to the effect of all 1887 Dawes surplus land statutes "opening" reservations to settlement, for all intents and purposes, the instant case could effectively resolve, because of or in combination with *Seymour* and *Mattz*, the status of each and every "opening" subsequent to 1887. Respondent would submit that for this Court to rely solely on the rationale of *Seymour* and *Mattz* and limit again its perspective to one statute and a particular reservation could result in a holding that would effectively negate the crux of nearly three decades of legislation intended by Congress to restore to the public domain over 100,000,000 acres of land previously held within the boundaries of Indian reservations.

A. IF NECESSARY, PERSUASIVE EVIDENCE OF CONTINUITY.

The conflicts and confusions within the Eighth Circuit and between the Eighth Circuit Court of Appeals and the South Dakota Supreme Court set forth above resulted in an extensive review of legislative history by the *parties* and the *court* in *Rosebud Sioux Tribe v. Kneip*, No. Civ. 72-4055 (D.S.D., filed Feb. 6, 1974) (mem). In a well written and extensively documented opinion, the Federal District Court of South Dakota, Northern Division, in the face of *Seymour* and *Mattz*

and the recent decisions of the Eighth Circuit Court of Appeals, held that the Rosebud Reservation had in fact been diminished by a series of bills enacted over a six year period (1904-1910).

Since the legislative history of the Rosebud Reservation represents the transition period from modified cession agreements similar to the Sisseton-Wahpeton Agreement to the exact "trust" replicas of the 1906 Colville Act, it is of a much more explicit and detailed nature than other legislative histories of many of the later acts which were simply introduced, understood and passed. In addition, because the Rosebud Reservation was the target of three separate acts, the partial opening effect similar to that described at 51-72, *supra*, is very pronounced, and enables one to view the effect of the acts both prospectively and retrospectively.

Therefore, Respondent will rely upon the above attributes of the Rosebud material to place this Court in a more advantageous position from which to view the whole process than was possible from an examination of the legislative history in *Seymour*. From this position Respondent will urge the Court to depart from the rationale of *Seymour*, if such an argument need be maintained.

It will not be necessary to set forth in the text of this brief any of the Rosebud material. The issue was extensively briefed by both parties prior to the 53 page memorandum decision of the Federal District Court. Both the briefs and the opinion are set forth in Appendix III. On appeal to the Eighth Circuit Court of Appeals the briefs of both parties were revised and updated and are set forth at Appendix IV. Respondent will rely on the arguments and legislative history presented therein.

Similarly, the Sisseton-Wahpeton materials and related documents discussed in earlier sections of this brief can be

utilized in a like manner with respect to the rationale of *Mattz*.

In this respect, it is interesting to note that even after the decision of this Court in *Seymour*, only seven decisions have applied the rationale therein to similar acts "opening" other reservations. On the other hand, seventeen federal and state supreme court decisions have found distinctions upon which to base their reluctance to reestablish reservation boundaries where none existed. *See* discussion, infra at 187-189.

B. IN THE ALTERNATIVE, A MOST SIGNIFICANT DISTINCTION.

> The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), restored to the public domain . . . from the Lake Traverse Reservation, South Dakota, about 660,000 acres, . . . Report of the Commissioner of Indian Affairs, 44 (1891).

In 1891 the Commissioner of Indian Affairs aptly and unequivocally described the precise effect the Act of March 3, 1891, had on the Lake Traverse Reservation. It is the position of Respondent that this Court should not construe the rationale of either *Seymour* or *Mattz* as controlling in the instant case.

1. *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The primary and most significant distinction is, of course, on the face of the acts. The Act of March 3, 1891, was a sum certain cession agreement with the United States Government whereby the United States bought and members of the Sisseton-Wahpeton band of Indians agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to" their surplus land. Act of March 3, 1891, 26 Stat. 1036. This certainly does not describe the "trust" situation in *Seymour v. Superintendent*, *supra*.

In fact, if any aspect of the *Seymour* opinion is analogous to the legislative history of the Sisseton-Wahpeton Agreement it would be the 1892 Colville Act which did extinguish, subject to individual allotments, the north half of the Colville reservation. After all the 1891 Act in the instant case is chronologically much closer to the 1892 Colville Act than to the 1906 Colville Act, to say the least. One could rationally assume that it should be more in tune with the prevalent attitude of Congress at the time, especially in the light of the Crow and Fort Berthold agreements discussed *supra*, that were procedurally on "all fours" with the 1892 Colville situation.

In addition, in *Seymour*, Justice Black deemed the public domain language of the 1892 Act significant. In this respect Respondent would call this Court's attention to the Annual Report of the Commissioner of Indian Affairs and statements of Senator Dawes and other congressman attributing the same precise effect to the Sisseton-Wahpeton Act. In both situations the allotments were to be situated on the public domain. Furthermore, immediately after the openings, both the 1892 Colville Reservation and the Lake Traverse Reservation were similarly removed from the Office of Indian Affairs Maps and Schedules recording the then existing Indian reservations in the United States. But for the fact that the 1892 Act affected only a portion of the Colville Reservation and the 1891 Act affected all of the Lake Traverse Reservation, the effect of both acts would have been the same. See the discussion of 1892 Colville Act, *supra*, at 131 by the Commissioner of Indian Affairs substantiating this position.

Even petitioner in *Seymour* recognized the importance of the similarities between the 1891 Sisseton-Wahpeton Act and the 1892 Colville Act when it cited *Application of DeMarrias*, 77 S.D. 294, 91 N.W.2d 480 (1958), and concluded that the acts had the same effect:

> *Application of Demarias* [sic], 77 S.D. 294, 91 N.W. 2d 400 (Resp. Br. 21), involved a burglary by an Indian on non-Indian land within the original boundaries of the Sisseton-Wahpeton Lake Traverse Indian Reservation in South Dakota. The land upon which the crime was committed, together with all other unallotted lands of the reservation, had been ceded to the United States in return for payment of a stipulated sum to the Indians. The cession was ratified by the Act of March 3, 1891, 26 Stat. 989, 1035-39, §§ 26-27, which provided *inter alia*, that lands ceded should be subject to the laws of the state. *Any similarity in the statutes relating to the Lake Traverse and Colville Reservations applies only to the north half of the Colville Reservation (ceded by the Act of 1892) and not to the diminished ("south half") reservation dealt with in the Act of 1906.* Reply Brief for Petitioner at 10, *Seymour v. Superintendent*, 368 U.S. 351 (1962) (emphasis added).

Secondly, Justice Black found that the 1906 Act repeatedly referred to the Colville Reservation in a manner that made it clear that the intent of Congress was that the reservation should continue to exist as such. Nothing in the Sisseton-Wahpeton Act can be fairly said to support a similar statement.

2. *Mattz v. Arnett*, 412 U.S. 481 (1973).

As was the case with *Seymour*, the most significant distinction between the Klamath River and Sisseton-Wahpeton Acts appears on the face of the acts. In the 1892 Klamath River Act the United States did not conclude an agreement with the residents of the Klamath River Reservation whereby they agreed to " . . . cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to . . ." their surplus land for a sum certain as it did in the Sisseton-Wahpeton situation.

Nor was the United States Government free to do anything it wanted with the proceeds from the sale of the lands to the

settlers in the 1892 Klamath River Act as it was in the Sisseton-Wahpeton situation. Again, as was the case with *Seymour*, the 1891 Sisseton-Wahpeton Act more closely parallels the 1892 Colville Act in both respects.

Similarly, as was the case in *Seymour*, petitioner in *Mattz* recognized and primarily relied on this cession distinction specifically when he stated in the text of the reply brief on the merits that:

> *Ellis v. Page, supra*, for example, involved an agreement between the Government and the Indians which provided that the tribes occupying the reservation would
>
> > 'cede, convey, transfer, relinquish [sic], and surrender, forever and absolutely, without any reservation whatsoever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced [within the reservation.]'
>
> The court described those words as 'unequivocal' (351 F.2d 250 at 252) and said
>
> > 'In treaty parlance they are as appropriate to disestablish the reservations as the Congressional words 'vacate and restore' employ in the 1892 Act to disestablish a part of the Colville Reservation.'
>
> In other words, the Tenth Circuit based its decision on what it considered language showing a clear intent to terminate.'
>
> *Tooisgah, supra*, and *DeMarrias, supra*, were based on agreements that are indistinguishable from the one considered in *Ellis*.
>
> The approach adopted by the *Ellis* court is exactly what Petitioner believes is required here. To terminate a reservation a statute must use a phrase such as . . . . Reply Brief for Petitioner at 7-8, *Mattz v. Arnett*, 412 U.S. 481 (1973).

Significantly, this language does restore surplus lands to the public domain.

Secondly, considerable importance was attached in the *Mattz* opinion to the fact that prior efforts to restore the surplus lands to the public domain in the Klamath River legislative history had failed. *Mattz v. Arnett, supra*, at 504. While only certain quarters of the House favored such action in the Klamath River situation, this was definitely not the case with the Sisseton-Wahpeton Agreement. The language of the annual report of the Commissioner of Indian Affairs, Senator Dawes and the other members of Congress who addressed themselves to the issue, all attributed the "public domain" effect to the Act of March 3, 1891. In this act Congress did "terminate the reservation and open it for white settlement" *Mattz v. Arnett, supra*.

The remaining and perhaps most important single statement of the *Mattz* opinion, as it relates to the instant case, is the standard of termination or disestablishment set forth therein: " . . . A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. . . ." *Mattz v. Arnett, supra*, at 505. In this respect Respondent would submit that the Sisseton-Wahpeton material set forth in Part I, *supra*, surpasses that which is required — both on the face of the act and *especially* in light of the surrounding circumstances and legislative history.

From the face of the *Mattz* opinion, it is apparent that this Court's attention was directed to the very specific situation it found to exist in the legislative history and surrounding circumstances of the Klamath River Reservation. Not even the repeated pleas of Petitioner for an adherence to the *holding* therein can detract from this fact. B.P. at 60, 62, 63. Nor is the assertion that it is "inescapable that *Mattz* controls *DeCoteau*" any more persuasive than the request for this

Court to "adhere to the *Feather* analysis." B.P. at 62, 63. If anything controls, it is the necessity for an independent analysis, as in *Mattz*, of the specific Act presented for construction herein and the legislative history and surrounding circumstances thereof.

VII

THE JURISDICTIONAL IMPLICATIONS OF THE STATUTORY DEFINITION OF INDIAN COUNTRY SHOULD NOT BE CONSIDERED UNTIL AFTER THE STATUS OF THE LAKE TRAVERSE RESERVATION HAS BEEN RESOLVED.

Respondent has waited until this point to discuss the jurisdictional implications of the material herein for the simple reason that it is not until after this Court has examined such material that a consideration of 18 U.S.C. § 1151 becomes relevant. The attempt on the part of the United States to insert its 1948 "crazy-quilt" argument at the outset of what should have been essentially a discussion of congressional intent at the turn of the century, is wholly misplaced, literally and figuratively. By following this argument to its logical conclusion, one would end up with approximately one-fifth of the entire western half of the United States "within" the boundaries of reservations that have heretofore been disestablished and restored to the public domain.

The position of Petitioner that in *1891* Congress was "undoubtedly aware" that "only exclusive federal jurisdiction solves this problem" of checkerboard jurisdiction and that a "consideration of the practical consequences of checkerboard jurisdiction refutes the inference that Congress approved of it in *1891*," while not misplaced in terms of consideration in the Brief, is patently in conflict with the reasons for and subsections of the 1948 statutory definition of Indian Country as well as numerous decisions of this Court. B.P. at 52, 53 (emphasis added).

The definition of Indian Country is set forth at 18 U.S.C. § 1151.

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139 § 25, 63 Stat. 94.

Only subsections (a) and (c) are relevant to the issue presented herein.

A. 18 U.S.C. § 1151(a): WITHIN THE LIMITS OF ANY INDIAN RESERVATION.

In 1948 when the definition of Indian Country was revised to its present form, it was the almost unanimous conclusion of the state and federal courts that "opened reservations" were not reservations at all. Rather, this terminology denoted areas which were once reservations but had been disestablished by special acts of Congress.

For example, in the Crow situation described, *supra*, after the opening the boundaries were receded to encompass the area remaining or the diminished reservation, the opened reservation was no longer within the boundaries of the Crow Reservation, although it continued to be improperly referred to as the "opened reservation." The trust allotments situated on the "opened" portions were interspersed among the fee land of the settlers after the opening—outside the boundaries of the reservation.

The trust allotments within the boundaries of the reservation were interspersed among the rest of the undivided tracts of trust land. After a period of time, the United States no longer held the title to all the area within the boundaries of the reservation in "trust." Primarily this situation was the result of the issuance of patents in fee to individual members of the tribe for one reason or another. In some instances the title to the land was further removed from the United States by the transfer thereof to another person—sometimes a member of the tribe and sometimes not.

This whole process soon resulted in the "checkerboarding" of fee and trust land *within* the diminished reservation. The jurisdictional ramifications soon resulted in a hotly contested issue in many of the state and federal courts. In 1948 Congress resolved the issue by defining Indian Country, in part, as

> (a) [A]ll land within the limits of any Indian reservation under the jurisdiction of the United States government, not withstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . 18 U.S.C. §1151.

In effect, Congress had codified the decisions of those courts which had previously resolved the issue consonant with the definition. The general definition was still based upon the latest construction of the term by this Court in *United States* v. *McGowan*, 302 U.S. 535 (1938), a situation in which the Government retained the title to *all* of the land which it validly set apart for the use of the Reno Colony in Nevada. With reference to the checkerboard issue, the Reviser's Note cited with approval and reliance the 1943 decision of *Kills Plenty* v. *United States*, 133 F.2d 292 (CA 8 1943), *cert. den.* 319 U.S. 759 (1943). *See* Reviser's Note, 18 U.S.C. §1151.

In *Kills Plenty* the Eighth Circuit Court of Appeals held that all of the land within Todd County was "Indian country" irrespective of the issuance of patents in fee. Todd County was the only county of the original Rosebud Reservation that had *never* been "opened" to settlement. Todd County was, for all purposes, *the* Rosebud Reservation, sometimes referred to as *the* diminished Rosebud Reservation in acts of Congress, opinions of state and federal courts, the Office and Bureau of Indian Affairs, maps, and every other source one can imagine from 1910 until 1972. *See* Appendix III, Appendix IV. In 1943 areas that were once reservations but were subsequently opened by special acts of Congress were *not* within the boundaries of reservations any more than the opened portion of the Crow Reservation was within the new boundaries of the diminished Crow Reservation.

Indeed, no one can read the *Kills Plenty* decision and the cases cited therein and support a contrary conclusion. This was the decided, almost unanimous, view in 1943 in all of the decisions of the state and federal courts. One can only imagine how the Reviser of 18 U.S.C. §1151 would have reacted had the Eighth Circuit Court of Appeals in 1950 reversed *Kills Plenty* and held that the boundaries of the Rosebud Reservation did not really encompass the diminished Rosebud Reservation, but actually remained as originally established in 1889, encompassing areas which were not within the boundaries of *the* reservation for over 40 years.

It is interesting to note that the 1922 decision of *United States v. Frank Black Spotted Horse*, 282 F. 349 (D.S.D. 1922), cited by Justice Black with approval in *Seymour* dealt with the same checkerboard situation resolved by the court in *Kills Plenty*: Todd County, the diminished Rosebud Reservation. The court in *Frank Black Spotted Horse* resolved the issue in the same manner that was later followed in *Kills Plenty*. When the Reviser cited Kills Plenty with approval he was in effect eliminating the impractical pattern of checkerboard jurisdiction. But this was "within" a diminished reservation *that had never been "opened."* Respondent has not

been able to ascertain from a reading of *Seymour* why Justice Black thought that such a situation within a portion of a reservation *that had never been* "opened" was persuasive in eliminating the impractical pattern of checkerboard jurisdiction in an area that had been "opened." All three of the decisions cited by Petitioner as "generally in accord" with the burden of checkerboard jurisdiction were similarly concerned with portions of reservations *that had never been "opened."* B.P. at 53, N.39 at 53-54, wherein a portion of the text of the *Frank Black Spotted Horse* opinion is set forth at length.

In one respect, the absence of any citations in the *Seymour* opinion to precedent on "all fours" with the Colville "open" reservation situation is understandable. *See* discussion at 175-179, *supra*. Prior to the decision, the decided *weight* of authority had for fifty years reached a contrary conclusion. Even more interesting, however, is the fact that even *after* the *Seymour* decision, in seventeen separate instances, state and federal courts still refused to apply the rationale therein to other reservations which had been "opened." *DeMarrias v. State of South Dakota*, 319 F.2d 845 (CA 8 1963), *aff'g* 206 F. Supp. 549 (d.S.D. 1962); *Ellis v. Page*, 351 F.2d 250 (CA 10 1965), *aff'g Ellis v. State*, 386 P.2d 326 (Okl. Cr. 1963); *Lafferty v. State ex rel. Jameson*, 80 S.D. 411, 125 N.W. 2d 171 (1963); *Wood v. Jameson*, 81 S.D. 12, 130 N.W. 2d 95 (1964); *Bird in the Ground v. District Court*, 239 F. Supp. 981 (D.Mont. 1965); *State v. Barnes*, 81 S.D. 511, 137 N.W. 2d 683 (1965); *State ex rel. Swift v. Erickson*, 82 S.D. 60, 141 N.W. 2d 1 (1966); *Beardslee v. United States*, 387 F.2d 280 (CA 8 1967) (dictum); *State v. Moss*, 471 P.2d 333 (Wyo. 1970); *State v. Satiacum*, 80 Wash. 2d 492, 495 P.2d 1035 (1972); *State v. Williamson*, 211 N.W.2d 182 (2.D. 1973); *DeCoteau v. District Court*, 211 N.W.2d 843 (S.D. 1973); *Rosebud Sioux Trive v. Kneip*, No. Civ. 72-4055 (D.S.D., filed Feb. 6, 1974) (mem.); *Cook v. State*, S.D. ,

215 N.W.2d 832 (1974); and United States ex rel. Feather v. Erickson, No. (D.S.D. filed May 30, 1973).

Perhaps these refusals to follow *Seymour* were simply a result of a reluctance to recreate reservation boundaries which had for over fifty years been disestablished. Perhaps some of the older decisions remained persuasive even against the glare of the *holding* in *Seymour*.

In any event, in only eight instances since the decision in *Seymour* have courts applied the rationale therof to "opened" areas and in six of these the questions were "close," the materials "inconsistent and confusing," "the comma's misplaced," the acts evidence of "poor draftsmanship," or the opinion founded upon a reluctance of a state court to disagree on a federal question. *City of New Town v. United States*, Civ. No. 1038 (January 26, 1971); *Leech Lake Band of Chippewa Indians v. Herbst*, 344 F. Supp. 1001 (D. Minn. 1971); *City of New Town v. United States*, 454 F.2d 121 (CA 8 1972); *State v. Molash*, 86 S.D. 558, 199 N.W. 2d 591 (1972); *United States ex rel. Condon v. Erickson*, 344 F. Supp. 777 (D.S.D. 1972); *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (CA 8 1973); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (CA 8 1973).

B. 18 U.S.C. §1151(c): ALLOTMENTS ON THE PUBLIC DOMAIN.

In 1948 even Congress realized that the definition of Indian Country set forth in 18 U.S.C. §1151(a) would not encompass those trust allotments on the public domain in the opened areas of what had theretofore been reservations. As a result, 18 U.S.C. §1151(c) was set forth as an addition to the definition of Indian Country.

> (c) [A]ll Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Logically enough, to support the continuation of these allotments as Indian Country, the Reviser cited *the decision*

of this Court which held that allotments on the public domain in the opened areas of what had theretofore been reservations should continue to be subject to federal jurisdiction. United States v. Pelican, 232 U.S. 442 (1914).

> Indian allotments were included in the definition on authority of the case of U.S. v. Pelican, 1914, 34 S.Ct. 396, 232 U.S. 442, 58 L.Ed. 676. Eightieth Congress House Report No. 304, Reviser's Note. 18 U.S.C. §1151.

In *Pelican* this Court held that federal jurisdiction was not extinguished merely because the trust allotment had been left behind on the public domain when the boundaries of a reservation were receded after the opening of that reservation. Specifically, this Court in *Pelican* was involved with the 1892 opening of the Colville Reservation which disestablished approximately one half of the Colville Reservation in the same manner as the Crow situation discussed, *supra*. To this extent, 18 U.S.C. §1151(c) specifically approved and provided for the impractical pattern of checkerboard jurisdiction. Some provision had to be made for the opening that left behind trust allotments situated on the public domain outside the boundaries of a reservation. Respondent would submit that this provision, 18 U.S.C. § 1151(c) was specifically tailored to fit precisely the situation presented by the Sisseton-Wahpeton opening.

It is interesting to note that as recently as 1967, the Eighth Circuit Court of Appeals, which had for years handed down cogent and authoritative decisions like *Kills Plenty* concurred in this analysis in another cogent and well-written opinion, *Beardslee v. United States*, 387 F.2d 280 (CA 8, 1967).

Oddly enough the issue in *Beardslee* was the same issue that had been previously presented in *Frank Black Spotted Horse* and *Kills Plenty:* Checkerboard jurisdiction in the diminished Rosebud Reservation, Todd County. The court in

Beardslee reaffirmed both of the previous decisions on point. Disestablishment could not be affected merely by the issuance of fee patents to an Indian or the conveyance thereof to another person. In 1948 Congress had eliminated the impractical pattern of checkerboard jurisdiction within reservations that had never been opened.

But this had nothing to do with the "opened" areas of what had theretofore been reservations and the court in *Beardslee* recognized the distinction.

> . . .Clause (c) came into the statute as the result of the holding in *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1942), namely, that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement. See Reviser's Note following 18 U.S.C.A. §1151 (1966), and 80th Congress House Report No. 304. Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the preceding portions of §1151. We regard (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. *Beardslee, supra* at 287.

The above analysis was soundly founded upon a careful reading of precedent, the Reviser's Notes of 18 U.S.C. § 1151 and citations therein, and represents the most thorough treatment of the question to date. In terms of the practical criminal considerations of checkerboard jurisdiction in the Sisseton area, there is no necessity for "tract book justice," contrary to the position of Petitioner. B.P. at 53. Approximately 90 percent of all crimes committed by members of the Sisseton-Wahpeton Tribe, misdemeanors and felonies alike, are committed within the limits of the city of Sisseton where there is no trust land.

Respondent has never questioned the validity or the necessity for the absence of checkerboard jurisdiction within the boundaries of reservations. But this whole process of commencing the consideration of issues similar to the nature of the one presented herein with the 1948 statutory definition of Indian Country could eventually lead to the resurrection of boundaries of reservations encompassing each and every allotment in the United States—boundaries which have been disestablished for over 80 years.

In terms of civil jurisdiction an objective appraisal of the area in question reveals that a viable reason to alter what has been for over eighty years the established and functional interrelationship of the Sisseton-Wahpeton Tribe, the Federal Government and the State of South Dakota, does not exist.

VIII

A VIABLE REASON TO ALTER WHAT HAS BEEN FOR OVER EIGHTY YEARS THE ESTABLISHED AND FUNCTIONAL INTERRELATIONSHIP OF THE SISSETON-WAHPETON TRIBE, THE FEDERAL GOVERNMENT AND THE STATE OF SOUTH DAKOTA DOES NOT EXIST.

Respondent has consistently taken the position that the 1891 Act disestablished the Lake Traverse Reservation. Since that time, the members of the Sisseton-Wahpeton Tribe, the State of South Dakota, and the Federal Government have consistently recognized and treated the area as such. Petitioner's attempt to portray the situation herein as similar to *reservation* areas that exist elsewhere is wholly untenable as evidenced by the events subsequent to the Act of March 3, 1891, and an examination of the area in question today.

Most significantly, the precise effect of the 1891 Act on the Lake Traverse Reservation is clearly evidenced by the manner in which the members of the Sisseton-Wahpeton Tribe accepted the provisions thereof. Unlike the underlying fact situations in the recent decisions of thisCourt relating to

civil jurisdiction within the boundaries of certain Indian reservations, the members of the Sisseton-Wahpeton Tribe have consistently recognized that the cession of their reservation set them apart from their brethren who continued to reside *within the boundaries* of a reservation. This realization has for over eighty years permeated every aspect of the interrelationship of the members of the Sisseton-Wahpeton Tribe and the state and local government. Of course, there have always been specific exemptions in relation to limited property restrictions and tax exemptions, not unlike the situation discussed in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). Similarly, the Federal Government has in this instance also continually recognized its obligation to the members of the Tribe insofar as it related to the Sisseton-Wahpeton agency and the supervision of certain federal programs thereunder. But these exemptions and services were not provided and made available to the members of the Sisseton-Wahpeton Tribe because they were situated within the boundaries of a reservation; rather, they were simply a result of the existence of the allotments and of the individual members of the Sisseton-Wahpeton Tribe residing thereon. In the main, the Federal Government structured its programs and duties around the very fact that the area in question was no longer a reservation and the individual members of the Tribe recognized the distinction.

From the very beginning, the State and local government was for all purposes the only local government that existed. If any tribal organization even existed in the first forty years

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24. As this Court stated in *Morton v. Ruiz*, 42 L.W. 4262, 4274 (1974):

> We have recognized previously that the weight of an administrative interpretation will depend, among other things, upon 'its consistency with earlier and later pronouncements' of an agency. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See, generally, K. Davis, 1 Administrative Law Treatise, §§5.03-5.06 (1958 and 1970 supp.). In this instance the BIA's somewhat inconsistent posture belies its present assertion. In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose.

subsequent to the Act of 1891, its existence would have been concerned only with the internal affairs of the individual members of the tribe in relation to the allotments, membership, and other business with the Federal Government, not unlike other tribes similarly located on allotments on the public domain. Indeed, a recognition of this very fact for all practical purposes precluded the members of the Sisseton-Wahpeton Tribe from being able to comply with the Indian Reorganization Act of 1934, a situation certainly distinguishable from that presented in *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

The first official sanction the Sisseton-Wahpeton Tribe as such ever received was not until *1946*[25] and then the allotments were nevertheless explicitly described as lying within what was *originally* the Lake Traverse Reservation. B.P. at 44. Even after 1946 the situation did not change. Members of the Tribe still conducted their everyday affairs in the same manner. With the explicit sanction of the Federal Government, many of the rights accorded the members of the Sisseton-Wahpeton Tribe in this respect were not available to members of any tribe within the boundaries of a reservation. The state and local government continued to be the only local government. All aspects of everyone's affairs, including domestic relations, were conducted in the only courts and under the only laws that ever existed in the area. This was the situation for only one reason. The area in question was not a reservation. The services of all branches of local government had not assumed this jurisdiction, with the explicit sanction of the Federal Government, "merely to fill a vacuum of unexercised, though existing, tribal jurisdiction." B.P. at 46. There was no tribal jurisdiction in this respect because there was no reservation. The underlying fact situation in the instant case is most illustrative of this very point.

25. A tribal council did not exist prior to 1946. The mere recognition of the existence of a tribe in this manner by the Commissioner of Indian Affairs does not create a reservation. Only Congress is vested with that authority. *United States v. Celestine*, 215 U.S. 278 (1909). Similarly, only Congress can recognize tribal governments as such.

At the time Robert Lee Feather was given up for adoption by his mother, the reason the action was not handled by the tribal court under the tribal code regulating such a procedure, had nothing to do with the State of South Dakota undermining "Federally protected tribal self-government." B.P. at 6. At the time, a Federally protected tribal self-government did not exist — *neither did a tribal court, nor a tribal code, nor even a tribal police force.* The statement of Petitioner that the tribal government was or is the "major functioning governmental entity within the reservation boundaries" which operates "the only effective police force and court system" cannot be substantiated.[26] In 1971 the area in question had not been within the boundaries of any reservation for nearly eighty years and the tribe could not have deterred the appalling treatment of the children in this case which occurred on non-trust land any more than it could have similarly regulated or controlled the behavior of Petitioner had the residence in question been in Minneapolis, Minnesota.

Contrary to the assertions of Petitioner, the State of South Dakota by its actions in the instant case, was not paralyzing the ability of the Tribe or irreparably interfering with essen-

26. Seven counties in whole or in part, are within the original boundaries of the Lake Traverse Reservation. Over one hundred individuals are directly involved in state and local law enforcement alone. With the exception of the Federal Public Health facility, the state and counties supply the service and maintain 95 percent of nearly everything from the schools that 95 percent of the children of the members of the Sisseton-Wahpeton Tribe attend, to the nearly 2,000 miles of roads "on the reservation." In all, the Tribe and Bureau of Indian Affairs employ less than 120 members of the 3,000 members of the Sisseton-Wahpeton Tribe. The Tribal Court and Code was established in the spring of *1971*, after the decision of the United States Court of Appeals in *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (CA 8 1973). The tribal police force, a total of nine individuals full- and part-time, was established in 1972.

Contrary to the assertions of Petitioner, the only deference to any tribal entity in this respect by any state agency was that required by the decision of *United States ex rel. Feather v. Erickson, supra*. Most certainly, the "willingness of the State to abstain from application of its judicial and law enforcement system" demonstrates nothing other than respect for a controlling decision of a federal court on a federal question. B.P. at 46. See Note 28 infra.

tial tribal relations. B.P. at 65, 67. The internal affairs of the Tribe remain and have remained the internal affairs of the Tribe. But this fact does not alter the geographical location of the members of the Tribe nor create a necessity for the resurrection of the boundaries of a reservation disestablished eighty years ago.

Although the area in question most certainly remains the home of some three thousand members of the Sisseton-Wahpeton Tribe, it is also the home of some thirty thousand other citizens of the State of South Dakota. While the allotments of the members of the tribe do constitute approximately fifteen percent of the total land base, only 1.5 percent of the allotments are actually resided upon or farmed by the members of the Sisseton-Wahpeton Tribe. As such, checkerboard jurisdiction, criminally or civilly, for all practical purposes does not exist. In all respects the area in question is not unlike similar areas in Oklahoma or anywhere else, that were restored to the public domain before 1900. To fully comprehend the extent to which this situation can be contrasted with any other area that has remained within the boundaries of a reservation, one need only refer to the fact situations in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), *Williams v. Lee*, 358 U.S. 217, (1959), *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971), *McClanahan v. State Taxing Commission of Arizona*, 411 U.S. 164 (1973), or any other decision which relates to the sovereign powers of a tribe within the boundaries of a reservation. In this light, the instant case most certainly does not involve state action infringing "the right of *reservation* Indians to make their own laws and be ruled by them." *Williams v. Lee, supra*, At 220 (emphasis added).

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27. The "unilateral usurpation of tribal exclusive jurisdiction" by the State of South Dakota asserted by Petitioner as the "*cause*" for the inordinate number of foster care and adoptive placements of Indian children does not merit even the recognition of this footnote. B.P. at 66.

For the tribe in reservation areas to subject non-members therein to special traders licenses, taxes for the right to do business on the reservation, special statutes regulating intoxicants, professional competency certifications for the right to practice law or medicine or any other profession therein in a tribal hospital, court of law or wherever, or exercise *whatever* sovereignty any tribe might lawfully exercise within the boundaries of its reservation today or fifty years from today is one thing. Any non-member therein has always been within the boundary of a reservation. But to subject the citizens who live within the seven counties which are in whole or in part encompassed by the original Lake Traverse Reservation to the same sovereign powers for the first time ever in *1974* is quite another proposition and certainly not within the purview of any of the above decisions or the rationale therein.

Some of the citizens in the outlying areas within the original boundaries of the original Lake Traverse Reservation, especially in North Dakota, have never even heard of the Sisseton-Wahpeton Tribe as such. In addition to subjecting the individuals in these same counties to any such sovereign power, when one considers the related loss of the inherent power of state and local government to regulate drivers' licenses, license plates, motor vehicle saftty inspections and related regulatory provisions, misdemeanors, repeated offenses such as driving while intoxicated which are not felonies or even crimes under the federal statutes, let alone the more serious criminal incidents which have recently occurred "within the boundaries of reservations" where for all practical purposes the Federal Government has *never* provided adequate law enforcement protection within the State of South Dakota — *with respect to not only the members of the Sisseton-Wahpeton Tribe, but also to any member of any tribe while therein* — this whole situation approaches disbelief without even considering the *nine* other counties in

South Dakota alone that will be similarly situated *for the first time.*[28]

With all due respect, Respondent finds it difficulty to believe that when this Court held that homesteading was not necessarily inconsistent with the continued existence of a reservation and stated that it was unable to find where Congress had taken away from the Colville Indians any part of the land within the boundaries of their reservation, it really meant *sub silento* to overrule nearly every decision in the United States for over sixty years and create the situation set forth above. *Seymour v. Superintendent*, 368 U.S. 351 (1962). For as the recent opinions of the Eighth Circuit Court of Appeals state in no uncertain terms, what was less than twelve years ago very much the exception, has rapidly become the rule *without exception.*

If the general welfare of the Indian people was dependent upon such a process, the whole situation might be viewed in a

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28. In almost any paper in South Dakota in any one week a plea similar to that appearing in the Sioux Falls Argus Leader, August 23, 1974, at 3, can be found:

Kneip Asks Ford's Attention On Reservation Jurisdiction

> PIERRE (AP) — GOV. Richard Kneip has asked President Gerald Ford to give immediate attention to problems of state jurisdiction on Indian reservations in South Dakota.
>
> "Legal restraints created by federal law and *federal court decisions* severely restrict the ability of local and state law enforcement to deal with growing lawlessness on reservations," Kneip said in a telegram to the President.
>
> "Fearful citizens threaten to take the law into their own hands unless they can be assured of law enforcement protection which can only be provided by federal authorities.
>
> "Both Indians and non-Indians urgently need your help in insuring their personal safety and property against criminal acts.
>
> "This is to advise you of an increasingly serious and volatile situation on and around the state's Indian reservations and to ask your immediate attention to the threat of public order and the legal process."

An armed confrontation in a service station owned by a non-member which resulted in the allegedly unjust arrest of the same non-member by *tribal* police on a *tribal* warrant was the precipitating cause of the above Gubernatorial request. Since the decision in *Feather, supra*, the area in question has been the primary source of similar incidents which have illicited similar pleas. In addition thereto, under different factual situations the Sisseton-Wahpeton Tribe, the Bureau of Indian Affairs and the Department of Justice have repeatedly urged cross-deputization of state authorities to protect the lives and property of the members of the Sisseton-Wahpeton Tribe and the non-member residents of the area when civil disturbances were threatened by a large group of non-resident members of other tribes.

different light. If there was any real reason to believe that true justice for the Indian people could only be found in two federal courts within the entire State of South Dakota, the whole situation might be viewed in a different light. If the Federal Government that created the reservation system required even today the most fundamental rudiments of justice such as assistance of counsel before a judge trained in the law in the very tribal courts that are to dispense justice to the Indian people, the whole situation might be viewed in a different light. Unfortunately, none of the hypotheses accurately portray the existing situation in the State of South Dakota. The very Tribe Petitioner has urged this Court to believe is about to be effectively eliminated as such, unless enclosed within the boundaries of a reservation, has prospered for eighty years on the public domain. The two federal courts are 500 miles apart and the very end urged by Petitioner has already resulted in a docket so clogged that it is nearly impossible to have any justice dispensed within 18 months. The tribal system of justice on the second largest reservation in the United States is such that not even the most rudimentary rights that are accorded the accused by the Indian Civil Rights Act are being observed.[29] There has not been a jury trial available to anyone on the Pine Ridge Reservation for over fifteen months.

If even the very system, created by the Federal Government and perpetuated by a bureaucracy that continues to exist only if it continues to perpetuate the system, had ever been shown to have existed for the general welfare and benefit of the Indian people, the situation might be viewed in

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29. Due Process under the 1968 Indian Civil Rights Act does not require court appointed council to defend the rights of indigents. No qualifications whatsoever are minimal to qualify as "counsel" or "judge." While the right to a trial by jury is required by the terms of the Act, in practice even this basic right is ephemeral. When one also considers that in civil actions, the tribal courts will be the only courts wherein non-members can bring a cause of action against the members of any tribe, the qualifications of the tribal judiciary and limitations on the right to practice therein assumes a degree of additional significance. Even more so, the remote possibility the assertion of criminal jurisdiction by the tribe over *non member residents* who have no representation whatsoever in the tribal government raises enough constitutional and other issues to "boggle one's mind." *See* Note 28, *supra*.

a different light. Fortunately, the members of the Sisseton-Wahpeton Tribe did not suffer under the burdens of this system for long. They ceded their reservation in 1889 and the last word from Congress specifically directed to the issue in the instant case and status of the 1867 Lake Traverse Reservation was the Act of March 3, 1891, which ratified that cession.

CONCLUSION

If one were simply concerned with the loss of state jurisdiction over members of the various tribes residing in areas predominantly populated by the same, a recreation of the situation as it existed on the maps of Indian reservations in 1870 or 1880 would not be a monumental catastrophe. Unfortunately, this is not the case. Thousands of other citizens now reside on farms and ranches and in cities and towns in the areas that would be engulfed by such a process. These individuals settled on the public domain and were never required or asked to abide by any of the special federal statutes concerned with various aspects of life within the boundaries of a reservation. Nor have they been subject to whatever "sovereign power" any tribe might today or 50 years from today exercise over non-members residing within the boundaries of a reservation.

Many of the citizens of the United States have *elected* to live within the boundaries of a reservation. They have knowingly decided to subject their lives and property to the many special federal and tribal laws therein. This was a choice presumably made with the realization of the consequences thereof. Such is not the case in the situation presented herein.

The members of the Sisseton-Wahpeton Tribe elected to cede their reservation in 1889. Congress ratified the cession in the Act of March 3, 1891. Since that time, the tribe has prospered. The tribal organization and the Bureau of Indian Affairs have worked hand in hand, in many instances with the State, to achieve this result. A portion of the land has always been held in "trust" and as such remains Indian Country today, but it has never been within the boundaries of the Lake Traverse Reservation since that reservation was disestablished by the Act of March 3, 1891. Respondent would submit that no sovereign necessity exists today to disregard the import of the probative evidence of that disestablishment presented herein.

It is respectfully submitted that the ruling of the South Dakota Supreme Court be affirmed.

Respectfully submitted,

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80. Of the 34 persons employed of the Bureau of Indian Affairs at the Sisseton-Wahpeton Agency only six are members of the Sisseton Wahpeton Tribe. A recent analysis of the total expenditures of the Bureau of Indian Affairs on the Pine Ridge Reservation concluded that but for the Bureau of Indian Affairs, over $10,000 could have been mailed directly to the head of each family in the Oglala Sioux Tribe. Poverty was prevalent on the Pine Ridge Reservation last year.